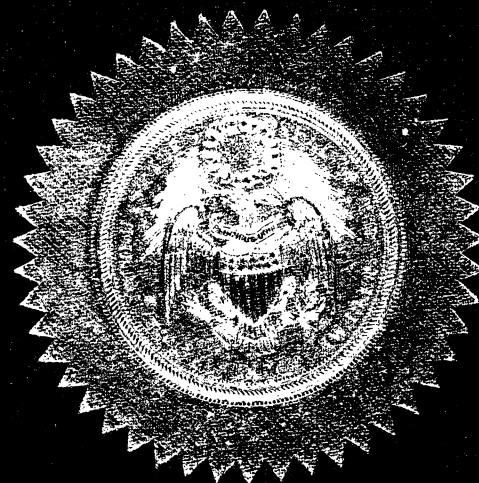


THE  
SUPREME COURT  
OF THE  
UNITED STATES



ITS HISTORY  
AND  
CENTENNIAL  
—  
CARSON

JOHN Y. HUBER COMPANY

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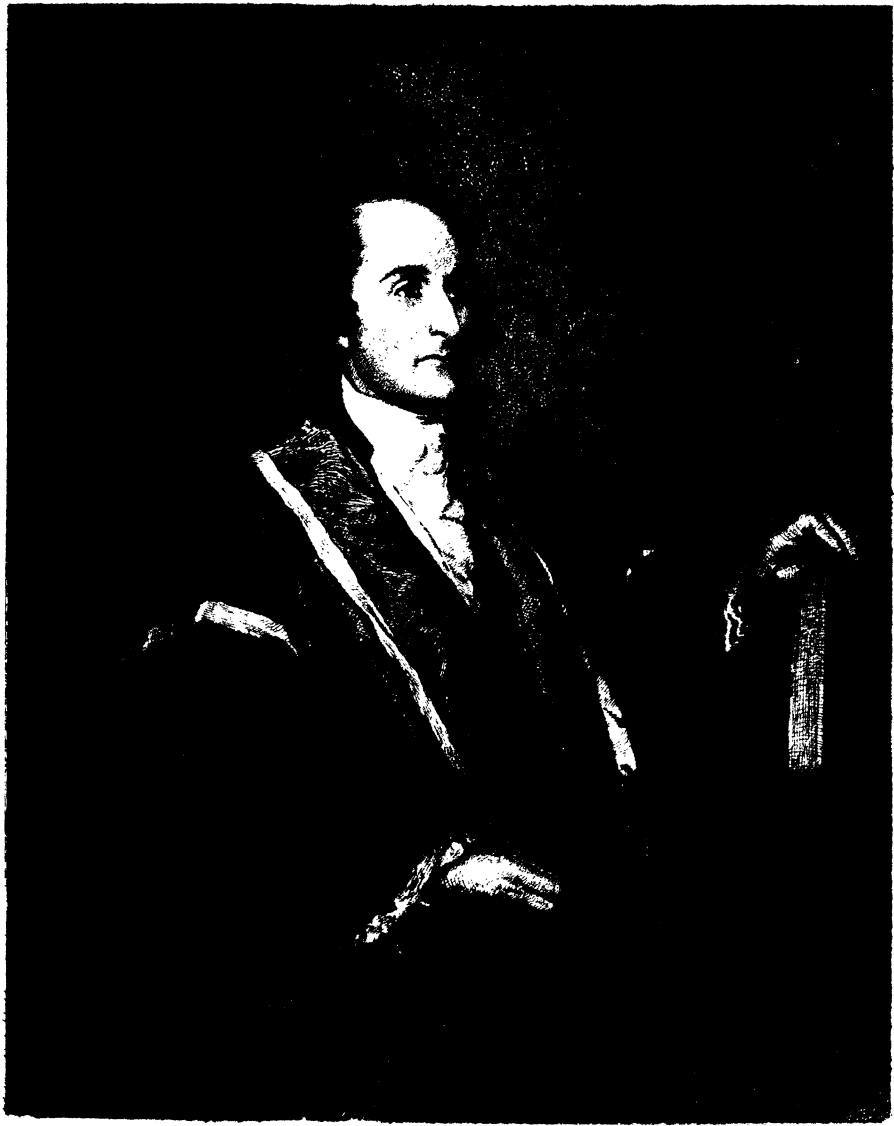
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*John Jay* —

# THE SUPREME COURT

OF THE

## UNITED STATES:

ITS

## HISTORY

BY

HAMPTON L. CARSON,

Of the Philadelphia Bar,

AND ITS

## CENTENNIAL CELEBRATION,

FEBRUARY 4TH, 1890.

PREPARED UNDER DIRECTION OF

THE JUDICIARY CENTENNIAL COMMITTEE.

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PHILADELPHIA:

JOHN Y. HUBER COMPANY.

1891.

*"What, sir, is the Supreme Court of the United States? It is the august representative of the wisdom and justice and conscience of this whole people, in the exposition of their Constitution and laws. It is the peaceful and venerable arbitrator between the citizens in all questions touching the extent and sway of Constitutional power. It is the great moral substitute for force in controversies between the People, the States and the Union."*—HORACE BINNEY.

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TO  
THE CHIEF JUSTICE AND ASSOCIATE JUSTICES  
OF  
THE SUPREME COURT OF THE UNITED STATES  
THIS VOLUME  
IS  
RESPECTFULLY DEDICATED.



# PREFACE.

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THE following History of the Supreme Court of the United States is published under the direction and authority of the Judiciary Centennial Committee of The New York State Bar Association, together with The Proceedings in Commemoration of the Centennial Anniversary of the Organization of the Court.

About two years ago the author succeeded in completing an interesting collection of the portraits and autograph letters of the members of the Court, and had made some progress in the arrangement of matter with the intention of writing a History—the plan meeting with the warm encouragement of the late Mr. Justice Miller—when through an accident, which he will ever regard as fortunate, he was brought in contact, through William Allen Butler, Esq., of the New York bar, with the Judiciary Centennial Committee, and the result of several conferences was the determination to publish conjointly the notable addresses delivered in New York City on February 4, 1890, and a sketch of the labors of the Court during the first one hundred years of its existence, in a volume which it is hoped will prove an interesting monument.

It is not a Treatise upon Constitutional Law that has been attempted. The subject has been treated chronologically. Topics and doctrines illustrative of different phases of our national growth are presented in the exact order of their occurrence and in natural sequence, displaying each epoch in contrast with those which precede and follow it, thus affording convenient opportunities of introducing at intervals, and not in mass, biographical sketches of the Judges. Spirit, movement and variety are thus sought to be imparted

to the narrative, and the activity of the Court as a powerful agent in promoting our development as a Nation portrayed.

The writer desires to express his grateful acknowledgments to the Chief Justice and Associate Justices of the Court for their active interest and sympathy and for the contribution of important and authentic matter, as well as for permission to use the seal of the Court as a device upon the covers of the book. His acknowledgments are also due to Mr. James H. McKenney, the Clerk of the Court, and his assistants for their courtesy and aid ; to Hon. Wm. H. Taft, Solicitor-General of the United States ; to William Henry Clifford, Esq., of the Portland bar ; to A. M. Waddell and Iredell Meares, Esqs., of the bar of Wilmington, N. C. ; to William S. Stryker, Adjutant-General of the State of New Jersey ; to Mr. Talcott Williams, of Philadelphia, and to Mr. Frederick D. Stone, the Librarian of the Historical Society of Pennsylvania ; to Mrs. Beck, the daughter of the late Mr. Justice Grier, and to Miss Baker, of Philadelphia, for most substantial assistance in the collection of biographical and historical data ; to the Judiciary Centennial Committee, and particularly to Hon. William H. Arnoux, for the Account of the Commemorative Proceedings. To the late Mr. Justice Miller and to the late Hon. H. I. Todd, of Louisville, Ky., he also confesses himself a debtor. His special thanks are due to his friend, Professor John P. Lamber-ton, for assistance in the proof-reading and suggestions of value ; to Horace M. Rumsey, Esq., of the Philadelphia Bar, for the verification of all citations of authority ; to Horace Castle, Esq., of the Philadelphia and Denver bars, for the Table of Cases and the preparation of the Index ; to Warren G. Griffith, Esq., of the Philadelphia Bar, for many courtesies, and to Mr. Henry Rainey for invaluable help with the manuscript.

The portraits have been etched by the well-known artists of Philadelphia, Max Rosenthal and Albert Rosenthal, who suggested the idea of illustrating the text, and whose knowledge, judgment, taste and skill in the execution of portraits of distinguished Americans are familiar to all collectors and historical students.

H. L. C.

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# A HISTORY

OF THE

## SUPREME COURT OF THE UNITED STATES.

---

### CHAPTER I.

#### GENERAL INTRODUCTORY VIEW.

A HISTORY of the Supreme Court of the United States, although chiefly of interest to the legal profession, cannot fail to contain much matter that will prove attractive to the general reader. It will involve not only an account of the establishment and organization of the tribunal itself, the development of its authority, and the manner in which its great powers have been exercised, but also an exploration of the sources of its jurisdiction to the earliest period of our national life. The former can be drawn from the inexhaustible mines of wealth to be found in the public records; the latter can be traced to the judicial powers exercised by the Continental Congress through the agency of Committees, and finally through the first Federal Court of Appeals, established January 15th, 1780, known as The Court of Appeals in Cases of Capture.<sup>1</sup>

<sup>1</sup> The records referred to consist of the Debates in the Federal and State Conventions which preceded and followed the Framing of the Constitution of the United States, generally known as Elliott's Debates on the Federal Constitution (4 vols.) and

Such a history will involve also a consideration of many of the phases of our social and political existence. Just as the student of English Constitutional History finds in the trials of Raleigh, Strafford, Sydney, Russell, the Seven Bishops and other martyrs and patriots the most striking examples of civil and religious policy, so the student of our history will discover in the State Trials of the United States and in decisions upon fundamental Constitutional questions the most faithful pictures and the most authentic memorials of the temper, the manners, the politics and the sentiments of the age. In the almost-forgotten case of the Sloop *Active* we can trace the successive features of a notable struggle for federal supremacy, through a period of thirty years, marked by the most dramatic incidents, exhibiting in its inception the political imbecility of the Continental Congress when brought into conflict with the power of a State, and in its final issue the complete and triumphant vindication of National authority. In the prosecutions brought under the Alien and Sedition Laws, in the trial of Henfield for illegally enlisting in a French privateer; or of Callender, indicted for a libel upon President Adams; in the trials of the Western Insurgents for insurrection against the excise laws; in the case of Robbins, on a claim for delivery to the British Government on a charge of murder; of Aaron Burr for high treason; of Mr. Justice

Supplement, containing the Madison Papers; Pennsylvania and the Federal Constitution; Maclay's Debates in the First Senate of the United States; Benton's Abridgment of Debates of Congress; Revised Statutes of the United States; Statutes at Large; Records of the Supreme Court of the United States; Reports of the Decisions of the Supreme Court of the United States; Journals of the Continental Congress; Articles of Confederation; Secret Journals of Congress; MS. Papers of the Continental Congress in the Library of the State Department; MSS. in the Office of the Clerk of the Supreme Court of the United States; Colonial Records and early State papers.



Chase, impeached for misconduct as a Judge; in the famous case of *Marbury v. Madison*; in the Dartmouth College case; in *Gibbons v. Ogden*; in the Dred Scott decision, in the Slaughter House cases, and in the Legal Tender cases, we find abundant material from which important facts of history can be drawn. These cases lie at the foundation of our jurisprudence and are destined to guide and control the most distant posterity.

Such a work will mingle the features of biography with a narrative of momentous events, portraying the character of famous judges and advocates, displaying the talents and learning of the sages of the law, while describing the scenes in which they were conspicuous actors. It will exhibit the birth, growth and decay of customs, the abolition of ancient institutions and the extension of maxims of free government to all the affairs of citizenship. It will delineate, on the one hand, the attitude of States in moments of defiance to National authority, or in the hour of their final resignation and defeat; and, on the other, will describe the limits of their independent and uncontrollable sovereignty. It will illustrate the conduct of individuals under an infinite variety of circumstances, while depicting the common phases of litigation.

In fact, the Court stands in such close relationship to the political and private rights of individuals in defending them from assault, and plays such an important part in defining our national obligations, and in determining the lawful bounds of State and Congressional authority under the Constitution of the United States, that no careful student of our institutions, who desires to comprehend the exact nature of his status as a citizen of our Federal Republic, will rest content with an examination of the debates in Congress or the administrative acts of the Presidents. For fullness and com-

pleteness of knowledge, for breadth of view and accuracy of information, for the true construction and interpretation of our Great Charter, he must turn to the decisions of the Judiciary which illuminate with steady and effulgent rays the history of the nation. The law embodies the story of a nation's development, and this truth has been recently dwelt upon by an eminent teacher of legal science, who declares: "The student of law in our times has come to recognize the fact that law is, in a sense, a branch of history, and is to be studied in a historic spirit and by a historic method; and as the student of law now recognizes the relation which exists between law and history, so also has the student of history come to recognize that a certain relation subsists between history and law."<sup>1</sup>

If we divide our Constitutional history into periods marked by the War of the Revolution, the years of chaos and dismay that preceded the Framing of the Constitution, the Organization of the Government, the early Presidential administrations, the War of 1812, the term of Marshall's judicial service, the ascendancy of State Rights, the agitation upon slavery, the Civil War, and the days succeeding those of Reconstruction, we will find subjects furnished for judicial action as full of characteristic variety as the periods themselves. We may expect, therefore, to discover in the decisions of the Federal Court of last resort not only the result, but an account of the many processes of our national development. We may gaze upon a panoramic view of our Constitutional jurisprudence, unfolding itself in executive acts

<sup>1</sup> Professor Henry Wade Rogers in his "Introduction to a Course of Lectures before the Political Science Association of the University of Michigan, upon The Constitutional History of the United States as seen in the Development of American Law."

and legislative policies, affecting both our foreign and domestic relations, revealing the extended domain of the law, and displaying, as on a chart, as did the Pillars of Hercules in ancient times, the ultimate limits of national jurisdiction. Within these are the coast lines and harbors and rich possessions of individual right.

Much material will be found full of fascination for the student of mankind. The contentions and conduct of men, whether springing from avarice or enterprise, whether stained with blood or stamped with the features of commercial competition, present a picture of society full of life and color, varying with the habits of thought and action of the age in which they occur, and dramatic in their grouping and character. The mighty contests of the forum deal with principles of universal application and facts of thrilling interest; they elicit the most astonishing displays of eloquence, logic and learning, and are followed by decisions of profound significance pronounced by jurists of incorruptible integrity, and of abilities which have commanded the respect of the world. They exhibit theatres of human action which, like many famous fields of battle, are memorable for the triumph of truth over error, for hard-won victories of justice over wrong. Amid the din of conflict between personal interests, and above the deep-mouthed thunder of the combat between contending sovereignties, the calm tones of our great tribunal have been distinctly heard, commanding States as well as citizens to submit without the spilling of blood to a legal settlement of differences. In this respect the Court is the Conservator of the Peace of the Nation, and her voice is the Harmony of the Union.

The manner, too, in which the Court is constituted is worthy of the closest attention. It was one of the sagacious

utterances of Edmund Burke that, "Whatever is supreme in a State ought to have, as much as possible, its judicial authority so constituted, as not only to depend upon it, but in some sort to balance it. It ought to give security to its justice against its power. It ought to make its jurisdiction as it were something exterior to the State." It may be safely asserted that this has been accomplished, in a great measure, in the judicial system of the United States. The dream of the philosopher has been realized. A separation almost complete has been effected between the judicial and the legislative and executive departments of our government. The wisdom of such a separation, first definitely expressed by Montesquieu, has been finally vindicated. In the making of laws the Judiciary has no share, nor has it any part in executive power. The happy manner in which the Framers of our Federal Constitution secured the independence of the Judiciary,—by the mode of appointment of the Judges, by making their tenure of office dependent upon good behavior, by the provision that the compensation of the Judges shall not be increased or diminished during their continuance in office, thus emancipating them from the control of the Legislature, and from the temptation of making their decrees a matter of barter,—has excited the admiration of all philosophical students of our institutions.<sup>1</sup>

The establishment of the Supreme Court of the United States was the crowning marvel of the wonders wrought by the statesmanship of America. In truth the creation of the Supreme Court with its appellate powers was the greatest conception of the Constitution. It embodied the loftiest ideas

<sup>1</sup> Francis Lieber, "Civil Liberty and Self-Government," Woolsey's Edition, p. 203. Story's "Commentaries on the Constitution," Vol. III, § 1571 *et seq.*

of moral and legal power, and although its prototype existed in the Superior Courts established in the various States, yet the majestic proportions to which the structure was carried became sublime. No product of government, either here or elsewhere, has ever approached it in grandeur. Within its appropriate sphere it is absolute in authority. From its mandates there is no appeal. Its decree is law. In dignity and moral influence it outranks all other judicial tribunals of the world. No court of either ancient or modern times was ever invested with such high prerogatives. Its jurisdiction extends over Sovereign States as well as over the humblest individual. It is armed with the right as well as the power to annul in effect the statutes of a State whenever they are directed against the civil rights, the contracts, the currency or the intercourse of the people. It restricts Congressional action to Constitutional bounds. Secure in the tenure of its Judges from the influences of politics, and the violence of prejudice and passion, it presents an example of judicial independence unattainable in any of the States and far beyond that of the highest Court in England.<sup>1</sup> Yet its powers are limited and strictly defined. Its decrees are not arbitrary, tyrannical or capricious, but are governed by the most scrupulous regard for the sanctity of law. It cannot encroach upon the reserved

<sup>1</sup> This is admitted by Professor Bryce, who, in writing of the Supreme Court, says: "The justices are nominated by the President and confirmed by the Senate. They hold office during good behavior, *i. e.*, they are removed only by impeachment. They have thus a tenure even more secure than that of English Judges, for the latter may be removed by the Crown on an address from both Houses of Parliament. Moreover, the English Statutes secure the permanence only of the Judges of the Supreme Court of Judicature, not also of Judges of County or other local Courts, while the provisions of the American Constitution are held to apply to the inferior as well as the superior Federal judges." (James Bryce, "The American Commonwealth," Vol. I, p. 226.)

rights of the States or abridge the sacred privileges of local self-government. Its power is never exercised for the purpose of giving effect to the will of the judge, but always for the purpose of giving effect to the will of the legislature, or, in other words, to the will of the law.<sup>1</sup> Its administration is a practical expression of the workings of our system of liberty according to law. Its Judges are the sworn ministers of the Constitution, and are the High Priests of Justice. Acknowledging no superior, and responsible to their consciences alone, they owe allegiance to the Constitution and to their own exalted sense of duty. Instructed and upheld by a highly educated bar, their judgments are the ripest fruits of judicial wisdom. Amenable to public opinion, they can be reached, in case of necessity, by impeachment by the Senate of the United States. No institution of purely human contrivance presents so many features calculated to inspire both veneration and awe.

The peculiar nature of the jurisdiction of the Court requires the Judges to be statesmen as well as jurists, and in most instances, tested by the results, wisely and well have they acted. Their decisions are not confined to mere questions of commercial law or narrow municipal regulations, but may involve the discussion and settlement of principles which affect the policy and welfare of the nation. The Court cannot consider abstract problems, however important, nor can it frame a fictitious issue for argument to satisfy a speculative interest in the result. It cannot anticipate by an hour the solution of a practical difficulty. It deals with the present and the past; it cannot put the remedy in force before the right accrues; but given a question, fairly presented by

<sup>1</sup> C. J. Marshall, in *Osborn v. Bank of the U. S.*, 9 Wheaton, 866 (1824).

the pleadings in a cause, then, however humble the parties to the suit, or however trifling the amount involved, the decision may sweep beyond the petty bounds of local customs or sectional statutes into the broad domain of international law, or rise into the loftiest regions of Constitutional jurisprudence. The Court has always upheld the National character of our Government and vindicated the National honor. At the same time it has carefully guarded the reserved rights of the States. The most comprehensive and statesmanlike views have happily prevailed.

A few illustrations will confirm this statement. A British creditor sued a citizen of the United States upon a debt sequestered by the State of Virginia during the Revolutionary War, and the argument taxed to the utmost the powers of the ablest advocates, while the decision expanded from a statement of the contractual liability of an individual to an assertion that the treaty obligations of the nation were paramount to the laws of individual States.<sup>1</sup> A citizen of South Carolina sued the State of Georgia, and although the storm of indignation that followed the decision upholding the suit led to an amendment of the Constitution of the United States, yet it was fortunate for the legal and moral influence of the Court that the Judges refused to bend before the popular fury.<sup>2</sup> A justice of the peace of the District of Columbia applied for a mandamus addressed to the Secretary of State, to enforce his right to a commission, and the decision sustained and vindicated the power of the Court to declare void an Act of Congress, as being repugnant to the Constitution, subjecting, once and forever, all executive and ministerial officers as well as Congress itself to the control of the Court

<sup>1</sup> *Ware v. Hylton*, 3 Dallas, 199 (1796).  
<sup>2</sup> *Chisholm Exr. v. Georgia*, 2 Dallas, 419 (1793).

in expounding the fundamental law.<sup>1</sup> An individual holding lands under a patent granted by a State brought suit against a trespasser, upon the covenants in his deed, and a statute of the State which had been passed in violation of his private rights was hewn to the ground.<sup>2</sup> An humble institution of learning resisted the attempt of a Legislature to amend its charter without its consent, and the decision placed all charters within the protection of the Constitutional clause which forbids States to impair the obligation of contracts.<sup>3</sup> A local branch of the Bank of the United States objected to State taxation, and the power of a State to destroy an agency of the general Government was denied in an argument which has proved to be a veritable bulwark of national authority.<sup>4</sup> The State of New York claimed the exclusive right to the navigation of the Hudson, and sought to confine it to her licensees, as a reward for the invention of propelling boats by steam. The decision destroyed the monopoly and emancipated the commerce of the nation from sectional control.<sup>5</sup> A State arrogated to itself the right to prohibit the transportation of merchandise from other States except on payment of toll or tribute, and the decision declared that inter-state commerce should be free.<sup>6</sup> Again a State endeavored to enforce a like prohibition with reference to the passage of citizens of the United States, from one part of the country to the other, through that State, and the decision upheld the personal right of unchallenged locomotion.<sup>7</sup> On numerous occasions the

<sup>1</sup> *Marbury v. Madison*, 1 Cranch, 158 (1803).

<sup>2</sup> *Fletcher v. Peck*, 6 Cranch, 87 (1810).

<sup>3</sup> *Dartmouth College Case*, 4 Wheaton, 518 (1819).

<sup>4</sup> *McCulloch v. State of Maryland*, 4 Wheaton, 316 (1819).

<sup>5</sup> *Gibbons v. Ogden*, 9 Wheaton, 1 (1824).

<sup>6</sup> *Almy v. The State of California* 24 Howard, 169 (1860). *Welton v. State of Missouri*, 91 U. S. 275. (1875).

<sup>7</sup> *Crandall v. State of Nevada*, 6 Wallace, 35 (1867).



States have endeavored to compel the payment of a **tax** before a citizen of another State should be at liberty to buy or sell within their borders. In every instance the decision has sustained the national character of our Union. Had the decisions been the reverse of what they were, and affirmed the pretensions of the States, which had been uniformly sustained by their own highest tribunals, the character and condition of our country would have been transformed into a scene of conflict between vexatious restrictions upon interstate commerce, and the States themselves would have been converted into prison cells, from which none could escape except upon payment of gate-money to the gaoler. A quarrel as to tolls arose between two bridge companies in Massachusetts, and the decision rescued the States from every effort to suppress those progressive improvements by which the earth has been subdued to the dominion of man, while at the same time proper and necessary restrictions were imposed upon the claims of exclusive right set up under color of legislative grant.<sup>1</sup> A negro in Missouri brought an action to assert the title of himself and family to freedom, and the decision led to the emancipation of a race.<sup>2</sup> A federal army officer refused to recognize a writ of Habeas Corpus issued from the Supreme Court, and the sword was snatched from the breast of the citizen by the hand of the civil power. The principle was established that where the Courts are open, and in the proper exercise of their jurisdiction, the right of a citizen to a trial by jury cannot be denied or abridged—a decision of such importance as to be clothed “with the heritage of immortality.”<sup>3</sup> A debtor attempted to discharge him-

<sup>1</sup> *Charles River Bridge v. Warren Bridge*, 11th Peters, 420 (1837).

<sup>2</sup> *Dred Scott v. Sanford*, 19 Howard, 393 (1857).

<sup>3</sup> *Ex parte Milligan*, 4 Wallace, 2 (1866).

self by the tender of government paper, and the war powers and the general sovereignty of the National government, and of its right to maintain itself, were stated and sustained.<sup>1</sup> A grant of a State was assailed on the plea of monopoly, and the decision saved the sovereignty of the State from annihilation, and put a just interpretation upon Federal power.<sup>2</sup>

These are but a few of the many instances of faithful service by the Court to the interests of the Nation, and although some of them were subjected at the time to fierce criticism, and may be still questioned by many, yet, viewed as a whole, they cannot fail to enlarge our sense of obligation to the Court. Few laymen appreciate, and many lawyers forget, the extent of their debt; but those who have studied the matter most profoundly are the most outspoken in their expressions of gratitude and praise. Besides these, which were public in character and far-reaching in their effect, arising under the Constitution, the laws of the United States or treaties made under their authority, or out of controversies to which the United States was a party, or out of controversies between States, or between a State and the citizens of another State,—the Court has performed a vast amount of silent and unseen work in the broad and fruitful field of commercial law, enlarging the bounds of the science of jurisprudence, and refining and strengthening the professional apprehension of the rights, duties and obligations of men in our complex state of society. Cases affecting Ambassadors or other public ministers and consuls; cases involving the rights, duties and liabilities of shipowners, shipmasters, mariners and material

<sup>1</sup> *Hepburn v. Griswold*, 8 Wallace, 603 (1870); *Legal Tender Cases*, 12 Wallace, 457 (1871; *Juillard v. Greenman*, 110 U. S. 421 (1883).

<sup>2</sup> *Slaughter House Cases*, 16 Wallace, 36 (1873).

men; questions of prize, the conflicting rights of captors and claimants, of neutrals and belligerents, trading under licenses, or privateering under letters of marque and reprisal; cases of admiralty and maritime jurisdiction; controversies between citizens or corporations of different States; questions of negotiable paper, insurance, partnership and personal relations in endless variety, have tested the energies of the Court. The business of the Supreme Court springs from that of a continent. It arises out of many systems of laws differing from each other in important particulars. It includes the most diverse cases tried in the lower courts in many different modes of procedure; some under the practice of the Common Law; some under the Chancery of England; some borrowed from French or Spanish law; some under special laws framed for the execution of Treaties entered into by the United States; and many more so anomalous as to be incapable of accurate classification. Yet the stability and uniformity of the course of decision are remarkable, and are due in a great measure to the length of time that the Judges have held office under the tenure of good behavior, but chiefly, as has been remarked by one of their number, because it is one of the favors which the providence of God has bestowed on our happy country, that for the period of sixty-three years, from the days of John Adams as President to those of Abraham Lincoln, the great office of Chief Justice was filled by only two persons, each of whom retained to extreme old age his great and useful qualities and powers.<sup>1</sup>

It will not be inappropriate to quote a few of the opinions of our most distinguished statesmen and jurists as to

<sup>1</sup> Remarks of B. R. Curtis upon the death of Chief Justice Taney, at a meeting of the Boston Bar, held Oct. 15, 1864.

the place occupied by the Court in our national economy, and to these may be added the views of accomplished foreign writers who have made our institutions the subject of close study. Washington, with sagacious insight into the true character of our government, then just established, declared, "Considering the judicial system as the chief pillar upon which our national government must rest, I have thought it my duty to nominate for the high offices in that department, such men as I conceived would give dignity and lustre to our national character."<sup>1</sup> Henry Clay pronounced the Supreme Court to be one of the few great conservative elements of the government. Pinkney called it "a more than Amphictyonic Council;" Webster spoke of it "as the great practical expounder of the powers of the government," and with awful solemnity declared, "No conviction is deeper in my mind than that the maintenance of the Judicial power is essential and indispensable to the very being of this government. The Constitution, without it, would be no Constitution—the Government, no Government. I am deeply sensible, too, and, as I think, every man must be whose eyes have been open to what has passed around him for the last twenty years, that the Judicial power is the protecting power of the government. Its position is upon the outer wall. From the very nature of things, and the frame of the Constitution, it forms the point at which our different systems of government meet in collision, when collision unhappily exists. By the absolute necessity of the case the members of the Supreme Court become Judges of the extent of Constitutional

<sup>1</sup> Letter of Washington to James Wilson, enclosing his Commission as an Associate Justice of the Supreme Court of the United States, dated Sept. 30, 1789. Original in possession of Miss Hollingsworth, of Philadelphia.

powers. They are, if I may so call them, the great arbitrators between contending sovereignties.”<sup>1</sup> Horace Binney declared that “It is the august representative of the wisdom and justice and conscience of the whole people. It is the peaceful and venerable arbitrator between the citizens in all questions touching the extent and sway of Constitutional power. It is the great moral substitute for force in controversies between the people, the States and the Union.” Sir Henry Maine speaks of it as a “unique creation of the founders of the Constitution.” Bryce, paraphrasing an expression of the Civil law, calls it “the living voice of the Constitution;” De Tocqueville says that “a more imposing judicial power was never constituted by any people;” Lord Brougham does not hesitate to pronounce that “the power of the Judiciary to prevent either the State Legislatures or Congress from overstepping the limits of the Constitution, is the very greatest refinement in social policy to which any state of circumstances has ever given rise, or to which any age has ever given birth;” while Von Holst, in his elaborate “Constitutional History,” treats the decisions of the Court with the profoundest respect.

The title of the Court to public veneration and esteem does not rest alone on the peculiar character of its jurisdiction, or its powers, or the wisdom with which they have been exercised, but largely upon the reputation of its Judges for purity and ability. The earliest members of the Court were those who had been conspicuous actors in the great drama of the Revolution, and who had played no unimportant part in the work of framing the Constitution. The first Chief Jus-

<sup>1</sup>Speech of Daniel Webster in the House of Representatives of the United States, Jan. 25, 1826.

tice, though not a profoundly learned lawyer, was a man whose character was "a brilliant jewel in the sacred treasures of national reputation," and "when the spotless ermine of the judicial robe fell on John Jay, it touched nothing not as spotless as itself." Beside him sat William Cushing, for many years the learned Chief of the Judiciary of Massachusetts; James Wilson, of Pennsylvania, whose transcendent merits as one of the most sagacious and eloquent logicians of the age, and one of the profoundest of our early statesmen, are looming into larger and still larger proportions as years go by; John Blair, of Virginia, with Wilson, a distinguished member of the Federal Convention, and a Judge of much experience in the Courts of his State. A few years later came John Rutledge, the most renowned of the sons of South Carolina, this time summoned to preside over the Court, after having declined to act as an Associate Justice, whose brilliant faculties sustained a sudden and sad eclipse, in part the cause and in part the effect of his rejection by the Senate; James Iredell, of North Carolina, the study of whose works cannot fail to awaken admiration of his qualities as a judge and his virtues as a man, and Thomas Johnson, of Maryland, formerly a member of the Continental Congress, and a lawyer of admitted power. Still later appeared Oliver Ellsworth, of Connecticut, a giant in the law, and the acknowledged author of our judiciary system; William Paterson, of New Jersey, the author and able advocate of the State Rights Plan in the Federal Convention, and Samuel Chase, of Maryland, a Signer of the Declaration of Independence, rough, impetuous and overbearing in manner as a judge, though fearless and honest, subsequently impeached for misconduct, but honorably acquitted. A younger generation succeeded, and the Court rose steadily, with John Marshall as Chief Justice, and

Bushrod Washington, Alfred Moore, William Johnson, Brockholst Livingston, Thomas Todd, Joseph Story and Gabriel Duvall as Associate Justices, until it touched the highest pinnacle of glory and power. This was the Golden Age of the Supreme Court. Of Marshall, the mighty Chief, of peerless reputation, by whose hand the Constitution was moulded into its final and permanent form, it would be impossible to write in terms of praise that would be deemed extravagant. Statesmen of all parties and jurists of all nations unite in pronouncing him to have been the greatest judge that America has produced, a man whose character is the "most exquisite picture in all the receding light of the early days of the republic." Washington was to Marshall what Sir Francis Buller was to Lord Mansfield, while Story, by his education, scholarship and extraordinary gifts as a writer, has won imperishable fame both at home and abroad. The remaining judges, with the exception of Moore, whom ill health forced to an early retirement, sat by the side of Marshall for many years, contributing to the growing strength of the Court and sharing in its renown. Not less useful, though far less known, were the labors of Smith Thompson, of New York, the associate of Kent, Robert Trimble, of Kentucky—too early snatched away, but leaving a judicial reputation earned by but few after so short a period of service,—John McLean, of Ohio, and Henry Baldwin, of Pennsylvania, whose vigorous minds and ample learning gave solidity to the structure which their predecessors had reared. The Court then entered on a new career; its former Constitutional doctrines were modified, and the influences to which it was subjected were shaken by the stormy passions that agitated the political sea. Although Chief Justice Taney has suffered much in reputation from the consequences of the Dred Scott

decision, yet few men, who will take the pains to study temperately the work of his long and conspicuously able judicial career will be unwilling to admit that his mind was of the highest order, that he steadily and firmly upheld and administered the great powers entrusted to the Court by the Constitution and laws of his country, as he understood them, and that his character was pure beyond reproach. As an upright and able magistrate, as a learned jurist, he was for twenty-eight years the most conspicuous figure upon a bench adorned by such men as Philip P. Barbour, of Virginia, formerly Speaker of the House; John Catron, of Tennessee, of acute and vigorous mind, with great power of juridical analysis and a marvelous capacity for labor; John McKinley, of Alabama, for some years a member of Congress, of high rank at the bar, and deficient neither in learning nor ability; Peter V. Daniel, of Virginia, the dissenting judge; Samuel Nelson, of New York, prominent in his knowledge of patent law; Levi Woodbury, of New Hampshire, the cotemporary of Webster, Clay and Hayne in the Senate; Robert C. Grier, a jurist of capacity; John A. Campbell, of Alabama, of vast learning, of active, penetrating mind, and of illustrious reputation in after years as a practitioner before the Court, wherein he once sat as an Associate, and Benjamin R. Curtis, of Massachusetts, perhaps the greatest jurist New England ever produced, certainly without a peer since the days of Jeremiah Mason and Theophilus Parsons. The next generation of Justices, although with one exception removed by death, can be recalled as familiar and venerated objects of popular regard. Nathan Clifford, learned and venerable; Noah H. Swayne, acute and logical; David Davis, who preferred the curule chair of a Senator to the robes of a Judge; Chief Justice Chase, the famous author of our national banking system; William Strong, whose name indicates his



hardy qualities of mind; Ward Hunt, sensible and discreet; Chief Justice Waite, self-possessed, modest, but sturdy and alert; William B. Woods, Stanley Matthews, brilliant but erratic; and Samuel F. Miller, not the least able or renowned of his associates, together constituted a Court which could be safely relied on for sound law and incorruptible judgments. To write of the living might savor of indelicacy, but nothing can be hazarded in the statement that the Court at the present time contains Judges whose profound and accurate learning, more massive and compact than that of former days, has left but little for future generations to regret.

Although at times shadows have rested upon its reputation and authority, which it will be the duty of the historian to notice, the Court enjoys the esteem of the Bar and the confidence of the People. No heavier responsibility rests upon the President of the United States than that of making fit appointments when vacancies occur. To sustain the lofty standard of the Court should be his highest aim. No motives of personal friendship or of political gratitude should tempt him to lower the tone of this great tribunal. The most commanding professional abilities, and the most unsullied private and public character should be demanded of every man who aspires to such high place. Wisdom, learning, integrity, independence and firmness have become the adamant foundations of the Court. The politician, the trickster, the demagogue, the disloyalist, the narrow-minded practitioner, wise in his own conceit, but unknown beyond a petty locality, should have no entrance there. Men of strength, of unspotted lives, whom power cannot corrupt, or influence intimidate, or affection swerve; men of exalted ideas of duty and honor, ready to dedicate themselves as the highest servants of Heaven to the noblest mission on earth, are alone fit to be entrusted

with the awful power of sitting in final judgment upon the rights of States and the liberties of individuals in the great Court of last resort under the Constitution of the United States.

A history of the Court would be incomplete if it failed to touch upon the Bar. The character of the Bench is largely a reflection of the character of the Bar. The Judges are drawn from its members. Besides this, an able bar can never tolerate a feeble bench, while an able bench will always elevate and educate a bar. They act and re-act on each other. No puerile argument or deceitful statement of facts can hope to prevail as long as the judges maintain the purity of the moral atmosphere that surrounds them. The rectitude of the bench means the rectitude of the bar. They are corollaries of each other. Viewed as a body, the members of the bar of the Supreme Court of the United States, with but few exceptions, have been intelligent, astute, laborious, well trained and well informed; manly in conduct, fearless in their defence of freedom and right, upright in principle, just and patriotic, cherishing a high and delicate sense of individual honor, displaying a proper regard for the dignity of their profession, and ever ready to acquiesce with profound respect in the decisions of the Court when once pronounced; while some of them have exhibited abilities of such transcendent character as to dazzle and astonish the nation. Among the forty distinguished men who have filled the office of Attorney-General—the official head of the profession—occur the names of Edmund Randolph, a legal flash-light; Theophilus Parsons, a profound lawyer, though not a brilliant one; William Wirt, who combined the skill of the literary artist with the knowledge of a jurist; William Pinkney, the glory of his generation, of whom Judge Story wrote,

"He possesses, beyond any man I ever saw, the power of elegant and illustrative amplification;" Henry D. Gilpin, an accomplished classical scholar; Benjamin F. Butler, a model advocate; Hugh S. Legaré, as much a master of Demosthenes and Cicero in the original, as of Vattel, Burlamaqui, Grotius and Wheaton; Reverdy Johnson, the acknowledged head of a bar once led by Luther Martin and Robert Goodloe Harper; Caleb Cushing, a man omnipresent in all departments of learning, and Jeremiah S. Black, whose argument in defence of the right to trial by Jury will live as long as our institutions last. Besides these were men who owed none of their influence to official station, who have brought, from all parts of the country, to the discussion of great questions, powers of the highest order. They have furnished to the Court the material of which the majestic temple of our jurisprudence has been built. It is true, as has been recently remarked by Mr. Justice Bradley, that the system of railroads and the consequent ease of communication, have had the effect of lessening the elevated and eclectic character of the arguments made before the Court. But there are times still when in a great cause the highest professional abilities are taxed to their utmost, and arguments are made which in splendor of eloquence and wealth of learning will vie with any of the olden times.

In truth it is impossible to estimate the intellectual and moral energies of the American Bar, its brain power, its vigor of reform, its prudent conservatism, its thrilling traditions, its beauties of principle, its glories of achievement, its mighty potencies to mould the destinies of States. The world of thought belongs to jurisprudence; the domain of every science and every field of literature acknowledge her title. The labors of the philosopher, however gigantic his scale of think-

ing, are not too lofty for her contemplation, nor dalliance with the Muses too frivolous to be despised. The universe has been swept in pursuit of knowledge; the treasuries of learning have been sacked; the vaults, where the wisdom of every age and clime is hidden, and the practical experience of centuries embalmed, have been broken open and rifled. The Institutes of Gaius, and the Pandects of Justinian; the Laws of Alfred, and the Magna Charta of King John; the Ordinances of the Sea; the pages of Coke and Hale; the decrees of Hardwicke, and the judgments of Stowell; the blood-bought experiences of the human race, and the lessons taught by the centuries that have gone, the precious principles bequeathed to us by the Fathers of the Republic have been stated, reasoned upon, expounded, illustrated and enforced by the mightiest intellects of Bench and Bar. It is not enough to point to the gilded dome, the fretted roof, the sculptured architrave, the ornate column or the richly decorated frieze; to impress upon the mind the wondrous character of the building. Attention should be called to the hidden arches, the mighty vaults, the base-stones far beneath the surface of the ground. There is the secret of its strength. The decisions of the Supreme Court of the United States, and the principles which they embody, constitute the foundations of our institutions—foundations which neither the earthquake of revolution can shake, nor the eruptive fires of civil war destroy. The House may become corrupt, the Senate may yield in time to wealth or ambition, but so long as the Supreme Court maintains its lofty teachings, so long as its maxims of interpretation and the principles which underlie its work are understood and cherished by the loyal people of the land, so long will a pledge exist that the liberties of America will prove immortal.

# PART I.

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## SOURCES OF THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

1680-1774.

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### CHAPTER II

INTRODUCTION: SPECIAL FITNESS OF THE FRAMERS OF THE CONSTITUTION FOR  
THEIR WORK: CLASSIFICATION OF SOURCES OF JURISDICTION: ADMIRALTY  
CASES: COLONIAL VICE ADMIRALTY COURTS: JURISDICTION: ACTS OF TRADE:  
COLONIAL JUDGES: EXTENSION OF JURISDICTION: REVENUE CASES: COLONIAL  
OPPOSITION: REMONSTRANCE OF FIRST CONTINENTAL CONGRESS.

THE Third Article of our Federal Constitution delineates in striking outlines the jurisdiction of the Federal Courts, and embodies in three brief sections the pregnant matter out of which has been developed the most remarkable judicial establishment the world has seen.

The first section vests the judicial power of the United States in one Supreme Court, and in such inferior Courts as Congress may, from time to time, ordain and establish: it regulates the tenure of office of all Federal Judges, prescribing that of good behavior, and guards their compensation against diminution.

The second section defines the extent of the judicial power, declaring that it shall extend to all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases

of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of one State claiming land under grants of different States, and between a State, or the citizens thereof, and foreign States, citizens, or subjects.

The original jurisdiction of the Supreme Court is expressly limited to all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party; while in all the other cases mentioned, the jurisdiction is appellate, both as to law and fact, with such exceptions, and under such regulations as Congress shall make.

Trial by Jury is provided for all crimes, except in cases of impeachment, and such trial is to be held in the State where the crime shall have been committed, or, when not committed within any State, at such place or places as Congress may by law have directed.

The third section defines the crime of treason against the United States. The testimony of two witnesses to the same overt act, or confession in open court, is necessary to a conviction: Congress is empowered to declare the punishment, but no corruption of blood, or forfeiture, except during the life of the person attainted, shall be wrought by an attainder.

Such is the language of the Article creating and defining the judicial power of the United States. It is the voice of the whole American people, solemnly declared, in establishing one great department of that government, which was, in many respects, national, and in all supreme. It must be patent to all who are familiar with the fact that our Constitution was not a creation, but a growth, that these results were not reached *a priori*. The truth is that this Article is an epitome

of past judicial and legislative experience lighted up by a sagacious forecast of the future.

Its authors combined a very rare union of the best talents, information, patriotism, probity, and public influence which the country afforded. Of the members of the Federal Convention, thirty-nine had seen active service in the Continental Congress; seven were signers of the Declaration of Independence; thirty-one were lawyers by profession, of whom four had studied in the Inner Temple, and one at Oxford under Blackstone; ten had served as Judges in their own States, of whom four were still upon the Bench; one had been a Judge of the old Federal Court of Appeals in Cases of Capture; seven had been chosen to serve as Judges in Courts specially constituted to determine controversies between the States as to territory and boundary, under the power conferred on Congress by the Ninth Article of the Confederation; eight had assisted in framing the Constitutions of their respective States; three had aided in the codification or revision of their own State laws; eight had served as Governors of States; five had been present at the Annapolis Convention; and three were universally recognized as oracles upon questions of local government as well as public or international law. All of them—whether lawyers or civilians—had witnessed the practical operation of our judicial institutions under the Crown of England and the Articles of Confederation, and had enjoyed the best opportunities of observing the merits and defects of both systems.

The profound intellects of James Madison and Alexander Hamilton, who ranked as jurisconsults, met in high debate such practical jurists as Oliver Ellsworth, George Wythe, David Brearley, John Blair, and George Read, and such forensic disputants as James Wilson, Jared Ingersoll, Abraham Baldwin, and Luther Martin. Their discussions were illuminated by

the brilliancy of Gouverneur Morris, John Dickinson, Edmund Randolph, and John Rutledge, and were tempered by the ripened wisdom of Franklin, and the marvellous sagacity of Washington. Not less useful, though of a subordinate degree of excellence, were the labors of George Mason, Rufus King, William Samuel Johnson, William Paterson, and Roger Sherman; while the criticisms of such experienced merchants as Robert Morris, Elbridge Gerry, and Thomas Fitzsimmons, and such respectable lawyers as Richard Bassett, Gunning Bedford, Jr., and Caleb Strong, contributed no small share to the general result of the deliberations of such an assemblage of statesmen.

While abundantly provided with a theoretical knowledge of the requirements of their task, it may be safely asserted that in arranging the judicial power they intended chiefly to enforce what experience had shown to be salutary in preserving harmony among the States and with foreign nations, and what wisdom dictated as essential to secure obedience to the authorities vested in the different departments of the Government. Hence, it will be found that a large portion of the judicial power bestowed by the Constitution of the United States closely resembles that exercised by the Continental Congress, although the greater part of the system, as we now view it, has grown out of the establishment of a General Government expressly designed to affect the concerns of a nation embracing a continent.

In analyzing the Article of the Constitution relating to the Judiciary, with a view of tracing the sources of the jurisdiction of the Supreme Court, and of measuring accurately the extent and value of the lessons of the past, it is proper to scan the acts of the Continental Congress to ascertain what steps were taken towards the erection of a Judiciary to



determine controversies arising out of the War for Independence.

Prior to the outbreak of hostilities the Colonies had their own separate judicial systems which constituted an important part of the framework of local government, but these were manifestly without authority to deal with interests not exclusively local. Several important classes of controversy soon arose, which in time led to a Federal jurisdiction; such were admiralty causes, affecting questions of prize; piracies and felonies committed on the high seas; controversies between the States, affecting rights of soil and boundary; disputes between individuals claiming under grants from different States; suits against a State in the courts of another State, and matters relating to the post-offices of the United States.

#### ADMIRALTY CAUSES.

Of these the Admiralty causes, by far the most frequent and important, first claim attention.

During the war between France and England, which terminated in the Peace of Ryswick in December, 1697, the colonists had taken advantage of the opportunities afforded them to carry on a direct commercial intercourse with Scotland and Ireland. The complaints of English merchants that New York would not respect the Acts of Trade, that Pennsylvania and the Carolinas were nests of pirates and rogues, and that the mariners of New England distributed the products of the tropics throughout the world, led to the establishment of the Board of Trade and Plantations, a permanent commission, consisting of a President and seven members, known as "Lords of Trade," who were invested with a jurisdiction similar to that previously exercised by plantation committees of the Privy

Council. The statutes for carrying the Acts of Trade into effect were consolidated; all direct trade with Ireland and the Colonies, except the export of horses, servants, and provisions, was prohibited, and, until the Union, Scotland was included, on the plea that if any imports were allowed they would be made a cover for smuggling. The appointment of the Colonial Governors was subjected to Royal approval, and an oath was imposed to enforce the Acts of Trade. All colonial statutes or usages conflicting with Acts of Parliament, were declared void, and, as a further security to British interests, Courts of Vice-Admiralty were established throughout the Colonies, in some instances by virtue of a right reserved in their charters, and in others without such right, with power to try admiralty and revenue cases without a jury. A strenuous resistance was made, especially in the chartered colonies, but after long and solemn argument, the doctrine was maintained by the Privy Council that the King had power to establish an admiralty jurisdiction in every domain of the crown, whether chartered or not. The right of Appeal from the Colonial Courts to the King in Council was also sustained in accordance with early practice in appeals from sentences in the English Court of Admiralty, and thus an extensive judicial control over the Colonies was obtained.<sup>1</sup>

After 1708 all appeals from the vice-admiralty courts were, in questions of prize, referred to certain Commissioners, constituting a standing committee of the Privy Council, provided appeals were made within fourteen days after sentence, and security was given that the appeals would be prosecuted

<sup>1</sup> Bancroft's "History of the United States." The Author's last Revision, Vol. II, pp. 79-80; Hildreth's "History of the United States." Revised Ed., Vol. II, pp. 196-199.

with effect:<sup>1</sup> and in instance and revenue cases an appeal lay to the High Court of Admiralty in England and thence to the Delegates.<sup>2</sup>

It was again asserted that an appeal lay to the King in Council but this opinion seems to have been subsequently relinquished.<sup>3</sup> In England cognizance of revenue cases was never claimed by the Court of Admiralty; that field being appropriated by the Common law to the Court of Exchequer, but in the colonies, the Vice-Admiralty Courts obtained a novel and extensive jurisdiction under the provisions of the celebrated Navigation Act of 12 Chas. II. c. 2 and the Revenue Act of 7 & 8 William III. c. 22, some features of which were intended for the more effectual suppression of piracy. The point was contested on the ground that revenue cases were not in their nature causes civil or maritime, but in 1754 it was fully and finally settled in favor of the jurisdiction in the case of the *Vrow Dorothea*, which was carried on appeal from the Vice Admiralty of South Carolina to the High Court of Admiralty, and thence to the Delegates in England.<sup>4</sup>

#### COLONIAL VICE-ADMIRALTY COURTS.

In some of the colonies the power of the Crown to establish Vice-Admiralty Courts was beyond dispute. In Mas-

<sup>1</sup>J. Franklin Jameson, "Essays in the Constitutional History of the United States."—"The Predecessor of the Supreme Court," pp. 13-14. <sup>2</sup>Browne's "Civil and Admiralty Law," p. 454. Blackstone's "Commentaries," Book III, \*69-70. Sergeant's "Constitutional Law," pp. 14-15.

<sup>2</sup>Note to "The *Samuel*" 1 Wheaton, 19 (1816); <sup>2</sup> Browne's "Civil & Admiralty Law," 493.

<sup>3</sup>2 Browne's "Civil and Admiralty Law," 493.

<sup>4</sup>*Vrow Dorothea*, 2 Rob. 246 (1754). <sup>2</sup> Browne's "Civil & Admiralty Law," 493, note. Note of Mr. Wheaton to the case of the *Sarah*, 8 Wheaton, 396 (1823). Sergeant's "Constitutional Law," p. 5. Chalmer's "Colonial Opinions," pp. 193-512.

sachusetts there was a plain reservation in the Charter, but the power was exercised even where no such reservation existed, and where, by express grant, the prerogative had been conferred upon the Proprietary. Thus in Pennsylvania the Charter conferred upon William Penn the sole right of appointing and establishing Judges, and by a subsequent provision he was made personally liable to see to the enforcement of the Navigation Acts and all the complicated requirements of the British colonial trading system, and was further bound to see that fines and duties in accordance with these regulations were duly imposed, and that when levied they found their way into the hands of the proper authorities.<sup>1</sup>

These functions were at first discharged by the Executive Council, for we find that, as early as July 12, 1684, upon information by the Sheriff of New Castle County that he had seized a ship which was an unfree bottom, it was ordered that the President, Thomas Lloyd, might empower such as he saw fit to be a Court of Admiralty for the determination of the case, and that on all other like occasions the President and present members might in the absence of the Council proceed to act according to the necessity of the case. Within two months a ship called the "Harp" of London was regularly proceeded against before the Council and condemned as a French bottom, in no way made free to trade or import goods into his Majesty's plantations in America, and, under the forfeiture clauses expressed in the Acts of Navigation, was sold.<sup>2</sup> But in 1693 William Penn incurred the displeasure of the Court and was for a time deposed from his government, and Benjamin Fletcher was duly commissioned Vice-

<sup>1</sup>Charter to Wm. Penn, Sections V, XIV.

<sup>2</sup>Penna. Col. Records, I. pp. 68-69.

Admiral of New York, the Jerseys and New Castle with its dependencies, and invested with all proper power to create Vice-Admiralty Courts within these limits.<sup>1</sup> Shortly after this a Vice-Admiralty Court for Pennsylvania and its territories was regularly constituted by royal and not proprietary authority, and a commission issued under the seal of the High Court of Admiralty of England to Colonel Robert Quarry to act as Judge.<sup>2</sup> By this time Courts of Vice-Admiralty were in full operation in all of the colonies. Anthony Stokes, his Majesty's Chief Justice in Georgia, says that all the commissions issued were alike, and in terms declared that the jurisdiction extended "throughout all and every the seashores, public streams, ports, fresh water rivers, creeks or arms, as well of the sea as of the rivers, and coasts whatsoever of our said provinces."<sup>3</sup> All causes, civil and maritime, embracing char-

<sup>1</sup> Historical Notes to the Duke of Yorke's Book of Laws, pp. 539 et seq.

<sup>2</sup> Minutes of Penna. Provincial Council, Feb. 12, 1697-8. 1 Col. Records, 500.

<sup>3</sup> Anthony Stokes, "A View of the State of the British Colonies in North America and the West Indies," pp. 150-168. For form of Commission see Stokes, p. 166. Benedict's Admiralty, §§. 142, 160. Duponceau on Jurisdiction, p. 158. Sergeant's "Constitutional Law," p. 4, note.

It has been a question learnedly discussed by those who have examined the matter whether the language quoted in the text conferred a different or more extensive jurisdiction than that allowed in England from the interpretation given by the Common Law Courts to the restraining statutes of 13 and 15 Rich. II. ch. 3, 2 Henry IV. ch. 11, and 27 Elizabeth ch. 11, and whether in point of fact the colonies were familiar with a larger jurisdiction than that prevailing in the mother country. The weight of authority, however, is in favor of the assertion that the admiralty jurisdiction actually exercised in the colonies transcended the narrow bounds prescribed by the jealousy of the Common law, and closely approached that now exercised by the Courts of the United States. Upon this side of the controversy appear the names of Story, Wayne and Nelson, sustained by those of Washington, Catron, McLean, and the overshadowing authority of Marshall and Taney; and on the other appear those of Woodbury, Baldwin and Daniel, whose dissent is powerfully expressed in opinions as remarkable for their learning and ingenuity as those of the majority of the Court. See *De Lovio v. Boit*, 2

ter parties, bills of lading, policies of marine insurance, accounts and debts, exchanges, agreements, complaints, offences, and all matters relating to freight, maritime loans, bottomry bonds, seamen's wages, and many of the crimes, trespasses and injuries committed on the high seas or on tidewaters were included within their jurisdiction. They also took cognizance of all cases of penalties and forfeitures under the Act of 7 & 8 William III., and exercised a general authority to apprehend and commit to prison persons accused or suspected of piracy.<sup>1</sup>

An examination of the records of the Vice-Admiralty Court in Pennsylvania from 1735 to 1746, the only portion now known to exist, discloses the fact that its business, though inconsiderable in amount, consisted of proceedings by the Collector of Customs by information against vessels and goods for breaches of the Acts of Parliament relating to the revenue; libels for seamen's wages; orders for the surveys of damaged vessels and goods and of wrecks, appraisements, with power to the Commissioner appointed to adjust the salvage in cases of wreck; records of protests, and, towards the end of the time, registers of letters of marque and reprisal granted by the governors, and prize proceedings against vessels captured from the French and Spaniards.

Gallison, 398 (1815). *Waring v. Clark*, 5 Howard, 459 (1847); *New Jersey Steam Navigation Co. v. The Merchants' Bank*, 6 Howard, 344 (1848); *Wilmer v. The Smilax* 2 Pet. Ad. Dec. 295 (1804); *Davis v. the Brig Seneca*, 18 American Jurist, 486 (1838); *The Sloop Mary*, 1 Paine, 673 (1824); *Bains v. The Schooner James and Catherine*, 1 Baldwin, 544 (1832); *The Huntress*, Davies R. 104, note; *Peyroux v. Howard*, 7 Peters, 324 (1833); *U. S. v. Coombs*, 12 Peters, 72 (1838); *The Schooner Tilton*, 5 Mason 465 (1830).

<sup>1</sup> *Benedict's Admiralty*, §. 161. Duponceau on Jurisdiction, pp. 137-140. Lawrence Lewis, "The Courts of Pennsylvania, in the 17th Century" in "Penna. Magazine of History and Biography," Vol. V. pp. 177-178.

## COLONIAL VICE-ADMIRALTY JUDGES.

From the names and characters, both official and private, of the Judges who discharged the duties of the vice admiralty, we catch glimpses of the fluctuating politics of the times both here and abroad. In New York in 1682, under the authority of James, Duke of York, Thomas Dongan acted as Vice-Admiral. Six years later Governor Edmund Andros was commissioned by James II, but his term of service was as brief as that of his royal master, for so severe and rapacious was his rule, that he was seized, imprisoned and sent to England for trial, and the next year William and Mary bestowed the office upon Henry Slaughter. In 1692, Governor Benjamin Fletcher acted under a commission which embraced "ye province of New Yorke, Colonyes of East and West Jersey, province of Pennsilvania, et Countries of New Castle and its dependencies." In 1698 we find the popular and highly accomplished Earl of Bellamont acting in New York, Massachusetts Bay, New Hampshire and its dependencies; his wise and equitable administration being in striking contrast with that of his successor, Edward Hyde, Lord Cornbury, the odious persecutor of the Quakers, Governor of New York, Connecticut, East and West Jersey, who was commissioned by William III. in 1701, the monarch expressly reserving the right of appeal to the High Court of Admiralty in England. Two years later the well-known Roger Mompesson exercised his sway from the Piscataqua to the Capes of the Delaware, for his commission ran into Massachusetts Bay, New Hampshire, Connecticut, Rhode Island, New York, East and West Jersey, Pennsylvania, New Castle and its dependencies,<sup>1</sup> but in

<sup>1</sup> Street's "New York Council of Revision," 75. 1 Logan Papers, 200.

some way Col. Quarry again secured a commission for Pennsylvania and West Jersey, which superseded that of Mompesson to that extent.<sup>1</sup> In 1704 John Moore was deputy Judge of the Vice-Admiralty for Col. Seymour, Governor of Maryland, and Vice-Admiral of Maryland, Pennsylvania and New Jersey; while in 1721, under George I., Mompesson was displaced in New York by Francis Harrison, and once more, in Pennsylvania, by William Assheton, a cousin of William Penn, to whom a commission was issued by Governor Keith. In 1735 the "Hon. Charles Read, Esq.," is called on the "Docquets" "the Comisary of the Court of Vice-Admiralty of the Province of Pennsylvania," and on the Minutes of his Court is styled "Sole Judge."<sup>2</sup> In 1737 the High Court of Admiralty in England bestowed the office in Pennsylvania upon Andrew Hamilton, the most renowned colonial lawyer of his day, who ten years before had won worldwide celebrity by his bold and eloquent defence of John Peter Zenger, anticipating by fifty years the contention of Erskine that in cases of criminal libel the jury were the judges of the law as well as of the facts. His successor, in 1741, was Thomas Hopkinson, "the ingenious Friend," to whom Franklin acknowledged himself indebted for a communication of "the power of points to throw off the electrical fire," and who yielded the place after ten years of service to Edward Shippen, afterwards Chief Justice of Pennsylvania, who made the position one of importance and great pecuniary value, until, in 1768, the appointment of Jared Ingersoll, the elder, of Connecticut, as Commissioner of Appeals in Admiralty for

<sup>1</sup> Logan papers, 281, Nov., 1703. *Penna. Col. Records*, Vol. I, p. 575.

<sup>2</sup> Martin's "Bench and Bar of Philadelphia," p. 5. Records of the Vice-Admiralty Court in Pennsylvania, in the Office of the Clerk of the District Court of the United States for the Eastern District of Pennsylvania.



New York, New Jersey, Pennsylvania, Maryland and Virginia, drew much business away from the regular Vice-Admiralty Courts. Shippen held the place, however, until the outbreak of the Revolution, when he lost all the offices he had held under the crown. In New York, about 1740, Lewis Morris had succeeded Francis Harrison, and was himself succeeded, after age and infirmities had disabled him, in 1762 by his son, the Hon. Richard Morris, who was in time displaced by Jared Ingersoll, the father of the member of the Federal Convention of the same name.<sup>1</sup>

Public events were now so shaping themselves as to render it of little consequence who held the office, except to make the incumbent an object of suspicion and dislike. The skies were overcast, and the storm-clouds of the coming revolution were soon to emit the lurid lightnings of war.

#### COLONIAL GRIEVANCES.

In 1768, in the spirit of aggression which had animated the Stamp Act, an Act of Parliament was passed to establish the Courts of Vice-Admiralty in all the colonies on a new model, expressly for the purpose of more effectually recovering the penalties and forfeitures imposed by the Acts framed for the purpose of raising a revenue in America. Their juris-

<sup>1</sup>The materials of the foregoing account are to be found in Stokes' "View of the Colonies;" Benedict's "Admiralty," §§ 142-145; Penna. Col. Records, Vol. III., p. 172, Vol. IV., p. 250; Lewis' "Courts of Pennsylvania in 17th Century," Penna. Mag. of History and Biography, Vol. V., p. 141; Sergeant's "Constitutional Law," note to p. 4; Keith's "Provincial Councillors of Pennsylvania," pp. 56-265; 2 Proud's "History of Pennsylvania," p. 291; Pennsylvania Magazine of History and Biography, Vol. VII., p. 23; Martin's "Bench and Bar of Philadelphia,"—the work of a painstaking and accurate antiquary; The Records from 1735 to 1746 of the Colonial Vice-Admiralty Court in Pennsylvania.

diction was extended far beyond the ancient limits, and the obnoxious statutes were stretched, not only to the collection of duties, but to the trial of causes arising merely within the body of a county *infra corpus comitatus*, and but remotely connected with admiralty or revenue affairs.<sup>1</sup>

These measures were met with angry remonstrances on the part of the colonists, which soon ripened into open opposition. The powers given to the Admiralty Courts to dispense with juries were denounced "as instances of grievous oppression, and scarce better than downright tyranny." In the words of John Adams, when announcing the declaration of the town of Braintree: "The most grievous innovation of all is the extension of the power of courts of admiralty, in which one judge presided alone, and, without juries, decided the law and the fact, holding his office during the pleasure of the King, and establishing that most mischievous of all customs, the taking of commissions on all condemnations." This language was echoed by Conway, in the House of Commons; the Act, he said, breathed oppression; it annihilated juries and gave vast power to the Admiralty Courts.<sup>2</sup> Another vicious feature was that the Judges of the Admiralty derived their emoluments exclusively from the forfeitures which they themselves had full power to declare.<sup>3</sup>

For nine years the contest was fiercely waged, and finally in the Address to the People of Great Britain, a paper drawn by John Jay, and adopted by the First Continental Congress, on the 21st of October, 1774, it was made the burden of bit-

<sup>1</sup> 4 Geo. III. c. 15-c. 34. 5 Geo. III. c. 25. 6 Geo. III. c. 52. 7 Geo. III. c. 41, c. 46. 8 Geo. III. c. 3. 22.

<sup>2</sup> Bancroft's "History of the United States," Author's Last Revision, Vol. III. pp. 147-205.

<sup>3</sup> Journals of Congress, Vol. I. pp. 21, 33, 47.

ter complaint that it had been ordained by Parliament that whenever offences should be committed in the colonies against particular acts imposing duties and restrictions upon trade, the prosecutor might bring his action for the penalties in the Courts of Admiralty, by which means the subject lost the advantage of being tried by a jury of the vicinage, and was subjected to the sad necessity of being judged by a single man, a creature of the crown, and according to the course of a law which exempted the prosecutor from the trouble of proving his accusation, and obliged the defendant either to evince his innocence or to suffer.<sup>1</sup> In the Address to the Inhabitants of the Colonies it was boldly charged that the judges of the Vice-Admiralty Courts, appointed by the crown and dependent upon it for support, were empowered to receive their salaries and fees from the effects to be condemned by themselves.<sup>2</sup> The same grievance was dwelt upon in the Petition to the King.<sup>3</sup> On the 24th of October, 1775, Congress entered into the celebrated Articles of Association,<sup>4</sup> and declared that the English Crown had extended the powers of the Admiralty Courts beyond their ancient limits, depriving the American subject of a trial by Jury, and authorizing the Judges' certificate to indemnify the prosecutor from damages; that oppressive security was required from a claimant of ships and goods before he could be allowed to defend his property. It was also stated that a Court had been established in Rhode Island for the purpose of taking colonists to England to be tried, subject to all the disadvantages that result in a

<sup>1</sup> Journals of Congress, Philadelphia, 1777, Vol. I. p. 41.

<sup>2</sup> *Ibid.*, pp. 49-51.

<sup>3</sup> *Ibid.*, pp. 68-71.

<sup>4</sup> *Ibid.*, p. 36.

foreign land "from want of friends, want of witnesses, and want of money."

Thus it appears that in every important State paper of the period the abuses of the admiralty powers were denounced in angry terms as substantial violations of the rights of freemen.

### CHAPTER III.

EFFORTS TO SECURE REDRESS: STEPS TOWARDS A FEDERAL JURISDICTION: WASHINGTON'S LETTERS: ESTABLISHMENT OF STATE ADMIRALTY COURTS: APPEALS TO CONGRESS REGULATED: METHODS OF PROCEDURE.

#### EFFORTS TO SECURE REDRESS.

FOR almost a year the energies of Congress were chiefly directed to a publication of the wrongs of the colonies, and in futile efforts at reconciliation. Further Addresses were issued to the inhabitants of Quebec and Canada, to the Assembly of Jamaica and to the people of Ireland, by which it was endeavored to enlist their sympathies in behalf of their suffering fellow-subjects. Non-importation, non-exportation and non-consumption agreements were entered into. After the war had actually begun, the military and naval forces were put upon a Continental basis, officers were commissioned, a Commander-in-chief was appointed, and rules and regulations for the army and navy were adopted. The questions of stores and supplies, the manufacture of powder and arms, the furnishing of troops, the appointment of Continental treasurers, the establishment of a general hospital and general post-office, the fixing the quota of troops and money for each colony, the emission of bills of credit, the consideration of military movements in the North, the siege of Boston, the operations in the neighborhood of Crown Point and Ticonderoga, and correspondence with the agents of the colonies in England in settling their accounts occupied, almost exclusively, the attention of Congress. As time went on, however, and outrages upon American commerce were committed by British ships of

war, attention was called to the necessity of some effective method of redress by placing the authority of law behind the force of arms. The first step was taken in Massachusetts. Elbridge Gerry, a young merchant of Marblehead, and a member of the Second Provincial Congress during its session of June, 1775, proposed the appointment of a committee to prepare a law to encourage the fitting out of armed vessels, and to establish a Court for the trial and condemnation of prizes. Although opposed on account of its apparent inconsistency with the provincial character of Massachusetts, the law as reported was passed on the 10th of November, 1775, and is "the first actual avowal of offensive hostilities against the mother country to be found in the annals of the Revolution."<sup>1</sup>

The preamble is a curious effort to reconcile the theory of obedience and the fact of resistance; to maintain nominal allegiance with actual rebellion. It was ingeniously grounded on the royal charter of the Province which authorized the levying of war against the common enemy of both countries, and declared that Great Britain had become such an enemy with her ships of war and armies employed against the common interest, and that accordingly, as loyal subjects, the men of Massachusetts were bound to employ all the power given by the Charter to capture and destroy them.<sup>2</sup> John Adams termed this one of the "boldest, most dangerous and most important measures and epochas in the history of the new world—the commencement of an independent national establishment of a new maritime and naval power."

<sup>1</sup> Austin's "Life of Gerry," Vol. I. p. 94.

<sup>2</sup> The Act and its Preamble were printed in the London Magazines of the day as a political curiosity. The Act itself is printed in its entirety in Austin's "Life of Gerry," Vol. I., Appendix A. It is also printed in the *Boston Gazette* of Nov. 13, 1775.

## STEPS TOWARDS A FEDERAL JURISDICTION.

In the Autumn of 1775 there were two classes of armed vessels cruising in the waters of Massachusetts, one sailing under the authority of the Continental Congress and the other under the authority of the Massachusetts Assembly. Captures were made by each, and conflicting questions of prize arose before any proper provision had been made by Congress for the regular condemnation of captured vessels. General Washington, then conducting the operations of siege against the town of Boston, found himself both embarrassed and annoyed by constant references for the determination of these questions. In a letter addressed to the President of Congress, dated the 11th of November, 1775, he enclosed a copy of the Massachusetts law, and declared that as the armed vessels fitted out at the Continental expense did not come under its terms, he would suggest that Congress should point out a summary way of proceeding. He then pertinently asks: "Should not a Court be established by authority of Congress to take cognizance of prizes made by the Continental vessels? Whatever the mode is which they are pleased to adopt, there is an absolute necessity of its being speedily determined on; for I cannot spare time from military affairs to give proper attention to these matters."<sup>1</sup>

Not hearing of the resolves of Congress, in a letter of December 4, 1775, he again declared that it was some time since he had suggested a Court for the trial of prizes made by the Continental armed vessels, which he would "again take the liberty of urging in the most pressing manner."<sup>2</sup>

<sup>1</sup> Sparks' "Life and Letters of Washington," Vol. III., pp. 154-155.

<sup>2</sup> *Ibid.* Vol. III., p. 184.

On the 26th of the same month, he wrote to Richard Henry Lee, "I must beg of you, my dear Sir, to use your influence in having a Court of Admiralty or some power appointed to hear and determine all matters relative to captures; you cannot conceive how I am plagued on this head, and how impossible it is for me to hear and determine upon matters of this sort, when the facts, perhaps, are only to be ascertained at points 40, 50 or more miles from Boston, without bringing the parties here at great trouble and expense. At any rate, my time will not allow me to be a competent judge of this business."<sup>1</sup>

Although Washington appears to have been in ignorance of the action of Congress, they were not inattentive to the subject-matter of his communications. In fact, they acted with remarkable promptitude. His first letter, received six days after its date, was immediately referred to a special committee consisting of George Wythe, Edward Rutledge, John Adams, William Livingston, Benjamin Franklin, James Wilson and Thomas Johnson.<sup>2</sup> On the 25th of November, 1775, they recommended that armed vessels and ships of force should be fitted out; that all war vessels which should fall into the hands of the colonists should be seized and forfeited, and that all transports containing naval or military stores for the use of the British army or navy should be seized and their cargoes confiscated. In order to give these resolutions effect and subject prizes to judicial condemnation, Congress suggested to the several legislatures to erect Courts of justice, or give jurisdiction to Courts then in being, for the purposes of determining all cases of capture, and to provide that all

<sup>1</sup> Sparks' "Life and Letters of Washington," Vol. III. p. 270.

<sup>2</sup> Journals of Congress, Vol. I. p. 183.



trials be had by a jury under such qualifications as should seem meet. It was ordered that all prosecutions should be commenced in the Court of that colony in which captures should be made; if no such court be at that time erected, or if the capture be made upon the open sea, then in the court which the captor should find the most convenient; but no captor was to be permitted to remove his prize from any colony competent to determine concerning the seizure after he had carried his prize within any harbor of the same. The important provision was made that in all cases an appeal should be allowed to Congress, or such person or persons as they should appoint, for the trial of the appeals; appeals were to be demanded within five days after definitive sentence, and lodged with the Secretary of Congress within forty days afterwards, and security was to be entered.<sup>1</sup>

Provision was also made for the proper distribution of prize-money.

This act was the first step towards the establishment of a national judiciary. But, though in the right direction, it did not reach its end. It created no tribunal, it provided no method of procedure, and no means of enforcing decrees. It was silent as to original jurisdiction, and left the extent of the appellate power in doubt; so much so, indeed, that collision occurred subsequently at several points between the States and Congress. It engrafted trial by jury upon admiralty proceedings, a novelty of uncertain value, as the event proved. It assumed authority which it did not undertake to define, and must be regarded as a crude and imperfect piece of legislation. Although moulded into more regular shape by various amendments, it is still interesting as the source of

<sup>1</sup> Journals of Congress, Vol. I. p. 184.

the admiralty jurisdiction exercised by Congress during the entire Revolutionary period.

Some of its defects did not escape the penetration of Washington, who wrote, "The resolves relative to captures made by Continental armed vessels only want a Court established for trial to make them complete." It was not until five years later that this thought was acted on.<sup>1</sup>

#### STATE ADMIRALTY COURTS.

In the meantime the colonies, except Massachusetts, whose action had preceded that of Congress, adopted with more or less promptitude the suggestion that they should erect Admiralty Courts, or clothe existing tribunals with the requisite authority.

Pennsylvania, as was to be expected from her close contact with Congress, led the way by the action of her Council of Safety, on the 3d of February, 1776, in approving the resolves of Congress as to the distribution of prize-money,<sup>2</sup> and on the 26th of March her House of Representatives resolved that there should be erected a Court of Admiralty, with an "able and discreet" person as a Judge, to take cognizance of and try the justice of captures, with power to summon a jury. A Marshal was appointed and the forms

<sup>1</sup> Professor Jameson has shown in an interesting and learned manner that the preference of Congress for trial by committee was mainly due to the presence of a doubt whether the powers of the Federal Government extended to the creation of a court, and also to the fact that the colonists had been accustomed to see prize cases carried on appeal from the Colonial Vice-Admiralty Courts to the standing commissioners of appeal of the Privy Council. "Essays in the Constitutional History of the United States," pp. 13-15.

<sup>2</sup> Minutes of Council of Safety, 10 Penna. Col. Records, 476.

of the libel and other process and proceedings were regulated. In all cases an appeal was to be allowed to Congress, and provision was made for taking testimony by depositions, or *ex parte* upon notice, *de bene esse*.<sup>1</sup> Rhode Island in January, South Carolina in April, Connecticut and Maryland in May, New Hampshire in July, New Jersey and Virginia in October, Georgia in November, Delaware, and North Carolina in December of 1776, instituted similar Courts under various titles. New York did not act until March of 1778, and then restricted the jurisdiction by re-enacting in substance the provisions of 15 Ric. II. c. 3, which forbade the cognizance of any matters not occurring strictly upon the sea.<sup>2</sup> In most of the colonies trial by jury was provided for. Maryland left it to the option of the parties, Connecticut and Georgia gave it to special County Courts, Pennsylvania, New Hampshire and Massachusetts made it obligatory. In some of the States the Judge of the Admiralty was appointed by a simple commission without a statutory specification of his powers, or any expression in his commission as to their extent; in others the

<sup>1</sup> Votes of the Pennsylvania Assembly, Vol. 6, p. 698. This resolve was supplied by the Act of 9th, September, 1778, recorded in Law Book I, p. 212, which provided that "The finding of said jury shall establish the facts without re-examination or appeal," and was in time supplanted by that of 8th March, 1780, which abolished trial by jury in Admiralty causes and restored the practice of the Civil law. McKean's Edition of Laws of Pennsylvania, p. 308. Prof. Jameson states that the Pennsylvania Court was established before the middle of January, 1776, and cites a letter of Thomas Lynch to Washington, dated January 16th, of that year, published in the "Correspondence of the Revolution," edited by Sparks, Vol. I, p. 125, but an examination of the letter leads me to believe that the writer referred to the Resolves of Congress of the preceding November. This is confirmed by the record evidence above cited, as well as by the fact that the Pennsylvania House of Representatives had adjourned from Nov. 25, 1775, until Feb. 12, 1776.

<sup>2</sup> 1 Greenleaf's "Laws of New York," 11, 18, 150, 152, 338. Benedict's "Admiralty," § 166.

courts were established with powers regulated by statute. The right of an appeal to Congress was variously provided for; the concession, as in Pennsylvania, South Carolina and Virginia, being liberally extended to all cases, while in others, as in New Hampshire and Massachusetts, it was restricted jealously to cases of capture by vessels fitted out at the charge of the United States, but in all other cases an appeal was to lie to the Supreme Court of the State. Thus it will be seen that in the different States the constitution of the Admiralty Courts and the limits of their jurisdiction departed widely from each other.<sup>1</sup> Changes of sentiment towards the Federal Government are distinctly visible from time to time. A reactionary feeling displayed itself in parts of New England. Rhode Island, by Act of November, 1780, reciting that as some States disallowed an appeal, and that those who do and those who do not are therefore on an unequal footing, declared that if any citizen of a State which disallowed an appeal to Congress was dissatisfied with the judgment of the Admiralty Court of Rhode Island, he might have an appeal to the Supreme Court of the State. New Hampshire, who had previously confined the jurisdiction of her own appellate Court to cases of capture made by vessels fitted out by her own citizens, now extended it to captures effected by Continental ves-

<sup>1</sup>The foregoing account is drawn from Benedict's "Admiralty," § 166; Jam-  
eson's "Essays in the Constitutional History of the United States," pp. 11-12; J. C.  
Bancroft Davis, "The Committees of the Continental Congress chosen to hear and  
determine appeals from Courts of Admiralty and the Court of Appeals in Cases of  
Capture," 131 U. S. Reports, Appendix XIX.; *Doane v. Penhallow*, 1 Dallas,  
218 (1780); *Penhallow v. Doane*, 3 Dallas 57 (1795); *United States v. Peters*, 5 Cranch,  
115 (1809); and the Laws, Schedules and Constitutions of the various States, as con-  
tained in the magnificent and unrivaled Tower Collection of Colonial Laws, in  
the Library of the Historical Society of Pennsylvania.

sels and vessels of New Hampshire jointly, endeavoring thereby to curtail the powers of Congress.<sup>1</sup> At the same time Pennsylvania abolished trial by jury in admiralty causes, and provided that in all cases of prize, capture or recapture, the facts should be determined by the law of nations and the acts and ordinances of Congress, before the Judge of Admiralty, by witnesses, according to the course of the Civil law, and that in all cases an appeal should lie from the final decree of the State judge to such judges or court as Congress should appoint to determine such appeals.<sup>2</sup> Virginia, too, provided that her judges of admiralty should be governed in their proceedings and decisions by the regulations of Congress as well as by the Acts of her Assembly; by the laws of Oleron and the Rhodian and Imperial laws, and by the laws of nature and nations, thus creating a wide and beneficent jurisdiction, far more liberal than that dictated by the policy of sister States, or contained within the narrow limits observed by the English Admiralty at the time.<sup>3</sup> A little later New York again curtailed her maritime jurisdiction, and declared that her Court of Admiralty should not meddle with anything done upon the waters of the State within the limits of a county.<sup>4</sup>

<sup>1</sup> Rhode Island Schedules, *Penhallow v. Doane*, 3 Dallas, 54 (1795).

<sup>2</sup> Act of March 8, 1780, McKean's Edition of Pennsylvania Laws, 308. This act was due no doubt to the danger of maintaining the controversy which arose out of the famous case of *Gideon Olmstead*, hereafter noticed in the text, which produced a serious collision between Pennsylvania and Congress, and led to conferences between Committees of Congress and of the State Legislature.

<sup>3</sup> Laws of Virginia, 1779, Chap. 26; (Nicolson's Laws, p. 104.)

<sup>4</sup> Laws of New York, 14th Feb., 1787. Chap. 24 (Vol. II. p. 394.)

## CHAPTER IV.

CONGRESSIONAL COMMITTEES OF APPEAL: SPECIAL COMMITTEES: STANDING COMMITTEE OF APPEAL: GROWTH OF FEDERAL POWER: CASE OF SLOOP "ACTIVE."

FROM this brief view of the State establishments we turn to the action of Congress. The purpose of that body to take only appellate jurisdiction was misunderstood at the outset. The first application was for the exercise of its original jurisdiction, made on the 31st of January, 1776, by Mr. Barbarie, owner of a sloop and cargo said to have been taken by the enemy and retaken by one of the Continental vessels of war; but he was informed that he ought to prosecute his claim before the Court to be appointed in the colony to which the prize had been carried.<sup>1</sup> A similar application was made in the case of the *Nancy*, but it was resolved that "the cause pertaineth to the judicature established in the colony of Connecticut for hearing and determining matters of the kind."<sup>2</sup> On the 4th of April, however, Congress was tempted, upon the memorial of an interested party, to regulate the sale of a prize-vessel, which had been run ashore, and the disposition of the proceeds; but as it afterwards appeared that the prize-master had acted contrary to the mode prescribed, and without the authority of Congress, the previous resolution was repealed.<sup>3</sup>

<sup>1</sup> Journals of Congress, Vol. II, p. 46. Judge Davis's Pamphlet on Federal Court of Appeals in Cases of Capture, p. 4; 131 United States Reports, Appendix XIX.

<sup>2</sup> *Ibid.* p. 74.

<sup>3</sup> *Ibid.* pp. 116-174. Davis's Pamphlet, p. 5.

The first appeal came up on the 5th of August, 1776, in the case of the *Thistle* which had been tried in the previous June before Judge George Ross and a jury in the Admiralty Court of Pennsylvania, upon the libel of the commander of the *Congress*, a private sloop-of-war, which had captured the schooner in the Gulf of Florida while bound on a voyage to Jamaica, with a cargo of supplies intended, as was alleged, for the British army. The case was heard upon libel, answer and proofs, after due notice in the public prints of the day, and was conducted by the well-known Joseph Reed and the celebrated William Lewis, then on the threshold of his distinguished professional career. The jury found, contrary to the overwhelming weight of the testimony, that a part of the vessel and cargo belonged to inhabitants of Great Britain, and that the residue belonged to persons who were also enemies, and thereupon the Judge entered a decree of condemnation as prize and directed a public sale.<sup>1</sup> From this verdict and sentence the owner appealed. At first there was a disposition on the part of Congress to hear the case as a body, but after various postponements it was referred to a special committee consisting of Messrs. Stockton, Huntington, Paine, Wilson and Stone, whose report, reversing the decree, was received and approved on the 25th of September.<sup>2</sup>

A few days later the gallant exploits of John Manly, Daniel Waters and John Ayres, commanders of the three armed vessels, *Hancock*, *Lee* and *Lynch*, who did so much to create a reputation for the American navy, were reviewed in an appeal by the captors of the *Elizabeth* against

<sup>1</sup> See original papers in the case of the *Thistle* in the Office of the Clerk of the Supreme Court of the United States. Also Supplement to *Pennsylvania Evening Post*, June 15, 1776, No. 219, p. 301.

<sup>2</sup> Journals of Congress, Vol. II, pp. 280, 289, 307, 328, 390.

a decree of Judge Joshua Brackett, of the Court Maritime of New Hampshire, discharging the vessel and cargo. Messrs. Paine, Huntington and Stone again acted as a special committee, with Messrs. Wythe and Smith, when after full argument by counsel, and a most elaborate review of the facts drawn up by the future Chancellor of Virginia, the report of the committee, reversing the decree, was, after a slight modification, adopted, and the cause was remitted to the State Court with directions to proceed and carry out the judgment of the appellate court.<sup>1</sup>

The practice of referring appeals as they were presented to special committees, the members of which were styled "Commissioners," was adhered to in several cases;<sup>2</sup> but in the mean time, it was determined, with a view of securing some uniformity of action, that a special committee of four should be appointed to review such of the resolutions of Congress as related to the capture and condemnation of prizes, and report what alterations or additions should be made.<sup>3</sup> This duty was assigned to George Wythe, John Rutledge,

<sup>1</sup> See case of the *Elizabeth*. Papers on file in the Office of the Clerk of the Supreme Court of the United States. Journals of Congress, Vol. II, pp. 369, 370, 387, 389, 393.

<sup>2</sup> The *Charming Peggy*, referred, October 17, 1776, to Messrs. Huntington, Paine, Wythe, Smith and Wilson. Journals of Congress, Vol. II. p. 420. The sloop *Betsy*, referred, November 7, 1776, to Messrs. Wythe, Paine, Wilson, Hooper and Rutledge. *Ibid.* p. 449. The sloop *Vulcan*, referred, November 27, 1776, to Messrs. Wythe, Paine, Wilson, Hooper and Chase. *Ibid.* p. 482. Libel of Esek Hopkins v. Richard Derby, ordered December 31, 1778, to be prosecuted before the Committee of Appeals (none named as members). *Ibid.* p. 320. The brig *Richmond*, referred, January 4, 1777, to the committee appointed on November 27th last, Mr. J. D. Sergeant and Mr. William Ellery being named in place of Mr. Wythe and Mr. Paine. Journals of Congress, Vol. III, p. 6. The brig *Phoenix*, referred, January 11, 1777, to the same committee. *Ibid.* pp. 16, 195.

<sup>3</sup> Journals of Congress, Vol. II. p. 420, 17th October, 1776.



Robert Treat Paine and Samuel Huntington, and as the result of their conference it was resolved, on the 30th of January, 1777, that a Standing Committee, consisting of five members, should be appointed to hear and determine upon all appeals brought against sentences passed on libels in the Courts of Admiralty in the respective States, agreeable to the resolutions of Congress, and that the several appeals, when lodged with the Secretary, be by him delivered to them for their final determination.<sup>1</sup> The members chosen were James Wilson, of Pennsylvania, Jonathan Dickinson Sergeant, of New Jersey, William Ellery, of Rhode Island, Samuel Chase, of Maryland, and Roger Sherman, of Connecticut. To these were added, in the following March, John Adams, of Massachusetts, George Read, of Delaware, and Thomas Burke, of North Carolina. The composition of this committee was favorable to an intelligent and dispassionate performance of its duties, as its members were among the most experienced lawyers in the public service, but in less than two months it was found to be too numerous for efficient work, and it was again reduced to five, any three of whom were empowered to hear and determine upon any appeal. Messrs. Wilson, Adams, Sergeant and Burke were retained, and James Duane, of New York, was added, with authority to appoint a register.<sup>2</sup> The conviction was gaining ground, however, as the lessons of experience multiplied, that the only method of avoiding the

<sup>1</sup> Journals of Congress, Vol. III, p. 43.

<sup>2</sup> *Ibid.* pp. 84-174. Changes took place from time to time in the composition of this committee, until January 15, 1780, when Congress established a Court of Appeals. Those who are interested in tracing these changes will be spared the labor of hunting through the Journals of Congress by consulting the Pamphlet of Judge J. C. Bancroft Davis, on the Federal Court of Appeals, in Cases of Captures, pp. 5-6-7.  
131 United States Reports, Appendix XIX.

evils of frequent changes in a body entrusted with judicial powers, was to adopt the original suggestion of Washington; and on August 5, 1777, a day was assigned to take into consideration the propriety of establishing a Court of Appeals<sup>1</sup>

The subject, though discussed from time to time, was not finally acted on until the 15th of January, 1780. It is important to observe that the necessity of vesting in Congress the power to establish judicial tribunals, consisting of Judges who should be independent of that body, had been fully discussed and amply provided for in the final draft of the Ninth Article of Confederation. Though not agreed upon until November 15, 1777, or finally ratified by all the States until March, 1781, yet there was displayed in its various stages of development the rapid growth of the idea that the United States in Congress assembled should have the sole and exclusive right of establishing rules for deciding, in all cases, what captures on land or water should be legal, and in what manner prizes taken by land or naval forces in the service of the United States should be divided or appropriated. To these were added the power of granting letters of marque and reprisal in time of peace, appointing Courts for the trial of piracies and felonies committed on the high seas, and establishing Courts for receiving and determining finally appeals in all cases of capture, with the proviso that no member of Congress should be appointed a judge of any of said Courts, and further, that the judicial power to be established by Congress should be the last resort on appeal in all disputes between two or more States concerning boundary or jurisdiction, as well as in all controversies concerning the

<sup>1</sup>Journals of Congress, Vol. III, p. 312.

private right of soil claimed under different grants of two or more States.<sup>1</sup>

Herein lay the germ of our National judiciary—the seminal principle which subsequently unfolded itself in the Constitution of the United States. The public mind was now ready to receive it, the soil had been prepared, and it required but time and favorable circumstances to quicken it.

A case was now presented to Congress which made a profound and permanent impression, and did more to expose the weakness of the system under which the States were operating than any other event to be found in the judicial annals of the period.

In September, 1778, Gideon Olmstead, of Connecticut, and three associates were captured by the British and carried to Jamaica, where they were put on board the sloop *Active*, bound for New York with a cargo of supplies, and forced to assist in the navigation of the vessel. They rose upon the master and crew, took possession of the sloop, and steered for Little Egg Harbor. When in sight of land they were forcibly taken by the armed brig *Convention*, belonging to Pennsylvania, and carried to Philadelphia, where the *Active* was libeled as prize. A claim was also made by the captain of a privateer cruising in concert with the *Convention*. The case was tried in the State Admiralty Court before Judge Ross and a jury, under an act which provided that the find-

<sup>1</sup> Compare the projected Articles of Confederation presented by Dr. Franklin on the 21st of July, 1775, with those in the handwriting of John Dickinson, on the 12th of July, 1776, and those reported in the new draft of 20th of August, 1776, by the Committee of the Whole, and the proceedings subsequent to the 8th of April, 1777, when the matter was taken up and debated, and the final form determined on November 15, 1777. Secret Journals of Congress, Vol. III, p. 502. Tit. History of the Confederation, published at Boston, 1820. Also Preston's "Documents Illustrative of American History," pp. 223, 224.

ing of facts by the jury should be final, without re-examination or appeal. The Connecticut captors were awarded but a fourth of the prize, the residue being divided between the State of Pennsylvania and the officers and crew of the *Convention* and the privateer. An appeal was taken to Congress, and referred to the Standing Committee of Appeals, and, after a full argument, the action of the State Court was reversed. Judge Ross refused to recognize the authority of Congress, insisting that the verdict was conclusive, and, in defiance of a writ in the nature of an injunction, issued by the Congressional Committee, ordered the sloop and cargo to be sold and the proceeds to be brought into Court. Thereupon the Committee declared that they were unwilling to resort to any summary proceedings lest consequences might ensue dangerous to the peace of the United States, but firmly declined to hear any other appeals until their authority as a Court of last resort should be so settled as to give full effect to their decrees. The matter was taken up by Congress and a spirited declaration entered upon its Journals in support of its authority, based upon the argument that a control by appeal was necessary to secure a just and uniform execution of the law of nations, and that it would be an absurdity to trust such matters to the accidental verdicts of juries in the State Courts. Conferences were held between Congressional and Legislative Committees with little effect, and so far as the rights of Olmstead were concerned, the decree in his favor remained a *brutum fulmen* until, many years afterwards, he secured the powerful interposition of the Supreme Court of the United States.<sup>1</sup>

<sup>1</sup>United States *v.* Judge Peters, 5 Cranch, 115 (1809). See *post.* Also, Papers in the case of the sloop *Active*, in the Office of the Clerk of the Supreme Court of the United States; The Whole Proceedings in the case of Olmstead *v.* Rittenhouse, by Richard Peters, Jr., Philadelphia, 1809.

## CHAPTER V.

ESTABLISHMENT OF THE COURT OF APPEALS IN CASES OF CAPTURE: JUDGES: CASE OF THE BRIG "SAVANNAH": DECAY OF THE COURT: ANALYSIS OF ITS WORK.

THE Continental Congress had declared that the absolute control by appeal was vested in them "over all jurisdictions for deciding the legality of captures on the high seas." But although powerless to enforce their decree, the members were so deeply impressed by the necessity for some definite action that on the 15th of January, 1780, they resolved "that a Court be established for the trial of all appeals from the Courts of Admiralty in these United States, in cases of capture, to consist of three Judges, appointed and commissioned by Congress, either two of whom, in the absence of the other, were to hold the said Court for the despatch of business."<sup>1</sup> The Court was to appoint its own register: trials were to be had therein according to the usage of nations and not by jury. The Judges were to hold their first session at Philadelphia, and afterwards at such times and places as they should deem most conducive to the public good, not further eastward than Hartford, Connecticut, or southward than Williamsburg, Virginia: the salaries were to be fixed, and in the mean time twelve thousand dollars were to be advanced to each. A few days later Congress proceeded to the election of Judges, and selected George Wythe, of Virginia, William Paca, of Maryland, and Titus

<sup>1</sup>Journals of Congress, Vol. VI, p. 10.

Hosmer, of Connecticut. The former declined, and Cyrus Griffin, of Virginia, was chosen in his stead. Commissions were issued;<sup>1</sup> the Court was styled "The Court of Appeals in Cases of Capture;" suitable oaths were prescribed; the method of conducting an appeal was stated, and all appeals then depending before Congress or the Commissioners of Appeals were referred to the newly erected tribunal, and all papers relating thereto were transferred from the Secretary of Congress to the register of the Court.<sup>2</sup> The resolution as adopted, though far in advance of anything that had been accomplished up to this time, lacked several important provisions which had been inserted in the first draft. Clauses providing that the Judges should have the powers of a court of record in fining and imprisoning for contempt and disobedience; that the State Admiralty Courts should execute their decrees, and that a Marshal should be appointed, were stricken out. Thus a tribunal of which much was expected was shorn of necessary and proper powers on the ground that it would not be wise to confer too high authority upon the Court or assume too extensive a jurisdiction for Congress, so difficult was it to overcome the prejudices of statesmen, even in the light of current events, against liberal grants to the Federal Government.<sup>3</sup> The tenure of the Judges was uncertain, and on June 25, 1781, an ordinance providing that they should "hold their commissions during good behavior" was lost.<sup>4</sup> The Court occasionally required aid from legislative action.

<sup>1</sup> For form of Commission see Journals of Congress, Vol. VI, p. 15.

<sup>2</sup> *Ibid.* p. 52.

<sup>3</sup> Papers of the Old Congress in the State Department at Washington, 29, 375. "Ordinance for Establishing," &c., endorsed "December 5, 1779;" a vote of four States for it and four against, is noted upon it.

<sup>4</sup> Journals of Congress, Vol. VII, p. 107.

In the case of the *Holker* an appeal had been entered, but owing to the indisposition and death of the register the necessary stipulations had not been entered into within due time. The Court refused to receive the bonds offered, being "by strictness of law incapable to interpose." Congress, by resolution, instructed the Court to receive and hear the appeal upon notice to the opposing parties and the entry of proper security.<sup>1</sup> An effort was also made to bring in an ordinance for the regulation of the proceedings of the Admiralty Courts in the States, and to revise and collect into one body the resolutions of Congress; to establish convenient rules of decision, and to call on the several legislatures to aid the powers reserved to Congress by the Articles of Confederation, but it bore no fruit.<sup>2</sup>

The work of the Court was performed during the first two years by Messrs. Paca and Griffin, Judge Hosmer having died in office early in August, 1780. Their decisions, though few in number, met with the approbation of foreign governments and jurists, and drew from the Count de Vergennes, at that time Prime Minister of France, an expression of admiration, which he directed the Chevalier de la Luzerne, the envoy of that nation, to communicate to Mr. Paca.<sup>3</sup> In November, 1782, Paca became Governor of Maryland, and resigned his judgeship; and, on December 5th, George Read, of Delaware, and John Lowell, of Massachusetts, were chosen to serve with Mr. Griffin, the presidency being given by lot to Mr. Read.<sup>4</sup>

It appears from the record that Congress had not resigned

<sup>1</sup>Journals of Congress, Vol. VII, p. 141.

<sup>2</sup>Journals of Congress, Vol. VII, p. 120.

<sup>3</sup>Sanderson's "Lives of the Signers," Vol. IV, p. 122.

<sup>4</sup>Journals of Congress, Vol. VIII, p. 21.

all control over the actions of the Court, for on the 8th of January, 1784, upon the memorial of one of the agents of the Prussian ship *Minerva*, concerning a decree of the Court of Appeals, it was resolved that the memorial, with the papers accompanying it, be referred to the judges to report to Congress, as speedily as may be, the proceedings, proofs and judgment in the case. It is not known, however, what became of this instruction.<sup>1</sup>

In the same month the case of the brig *Susannah* was brought before Congress, upon the representation of the legislature of New Hampshire, touching the extent of the right of appeal to Congress in cases of capture under their Act of Assembly, and it was ordered that all proceedings upon the sentence of the Court of Appeals ought to be stayed.<sup>2</sup> The matter involved an examination of the powers of Congress, substantially the same as that in the Olmstead case; but though reported on at great length, and leading to a somewhat acrimonious debate, in the course of which a motion that it was improper for Congress in any manner to reverse or control the decisions, judgments or decrees of the Court of Appeals was lost, the question was not finally settled until brought before the Supreme Court of the United States, in the shape of the case of *Penhallow v. Doane*, which finally determined the controversy in favor of the action of the Court in support of Federal power.<sup>3</sup> The business of the Court soon dwindled, and in a letter of December 23, 1784, the judges informed Congress that all the cases which had been brought before them had been determined. The Com-

<sup>1</sup>Journals of Congress, Vol. IX, p. 16.

<sup>2</sup>*Ibid.* Vol. IX, pp. 17, 27, 33, 68.

<sup>3</sup>Journals of Congress, Vol. IX, p. 69. *Penhallow v. Doane*, 3 Dallas, 54 (1795).



mittee to which the matter was referred reported that in their opinion the Judges were still in commission, and that it would still be necessary for the Court to remain upon its present establishment, except with respect to salaries, which should cease, and that in lieu thereof they should receive a per diem allowance during the time they should be in active service, including the time spent in necessary traveling. This led to a remonstrance from Mr. Griffin, but on the 9th of February, 1786, Congress resolved that though fully impressed with a sense of the ability, fidelity and attention of the Judges of the Court of Appeals, yet, as the war was at an end, and the business of the Court in a great measure done away, attention to the interests of their constituents made it necessary that the salaries of the Judges should cease.<sup>1</sup>

About the same time the State Courts began to assume jurisdiction over appeals, while in Pennsylvania the High Court of Errors and Appeals was expressly constituted by the Act of February 28, 1780, to hear appeals from the Supreme Court, the Register's Court and the Court of Admiralty, and the Act was conformed to in several cases which did not reach the Federal Court.<sup>2</sup> The labors of the Court of Appeals in Cases of Capture, however, were not yet at an end. On the 27th June, 1786, on the report of a committee to whom were referred several memorials and petitions from persons claiming vessels in the Admiralty Courts of some of the

<sup>1</sup> Journals of Congress, Vol. IX, p. 304.

<sup>2</sup> *Montgomery v. Henry*, 1 Dallas, 49, April, 1780. *Talbot v. The owners of Three Brigs*, *Ibid.* 95, September, 1784. In this case it was contended that an appeal properly lay to the Federal Court of Appeals, but the decision of John Dickinson, then a Judge of the High Court of Errors and Appeals, sustained the State jurisdiction. *Purviance v. Angus*, *Ibid.* 180, September, 1786. All of these were appeals from the Admiralty Court in Pennsylvania, and proceeded no further.

States, praying for hearings and re-hearings before the Court of Appeals, it was resolved by Congress that the judges be directed, in every case, to sustain appeals and grant re-hearings or new trials wherever justice and right might require it. It was also ordered that the Court assemble in the following November, at the City of New York, for the despatch of such business as might come before it.<sup>1</sup> The last entry in the Journals of Congress relating to the Court was on the 24th of July, 1786, empowering it to hear an appeal against a decree in the Court of Admiralty of South Carolina, condemning the sloop *Chester*, in which Alexander Hamilton appeared for the appellants. The judges met again, however, in New York, during May, 1787, as appears by several reported cases, and by opinions and decrees delivered at that time.<sup>2</sup> They then proceeded to Philadelphia, where, on the 16th of May they held their last session, and adjourned without day, and the Court, which has been characterized by Professor Jameson, not simply as the predecessor, but as one of the origins of the Supreme Court of the United States, passed into history at the very moment when the Federal Convention was engaged in the lofty task of erecting a far more comprehensive and effective judiciary as a part of the system adopted by the people of the United States in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare and secure the blessings of liberty to themselves and their posterity.

<sup>1</sup>Journals of Congress, Vol. IX, p. 201.

<sup>2</sup>*Lake v. Hulbert* and *Chester v. Experiment*, 2 Dallas, pp. 40-41 (1787).

## ANALYSIS OF THE WORK OF THE COURT.

An analysis of the papers, records and proceedings of the Court of Appeals, which were deposited in the Office of the Clerk of the Supreme Court of the United States, under the Act of Congress of May 8, 1792, shows that there were one hundred and ten prize cases decided by special committees, the Standing Committee of Appeals in the Continental Congress, and the Court of Appeals, exclusive of the eight reported by Dallas.<sup>1</sup> In forty-five of these the judgments of the State Courts were reversed; in thirty-nine the judgments were affirmed; twelve were dismissed, the parties not appearing; jurisdiction was declined in two; four were settled by the parties; while the final action in eight is not known, as the decrees are missing; one was stricken off because the appeal came too late, and in one the action is doubtful. Twelve cases came from Pennsylvania, in eight of which the judgments were affirmed, and in three reversed, the remaining case being settled. Three cases came from New Hampshire, in all of which the judgments were reversed. Twenty-seven cases came from Massachusetts, of which fifteen were affirmances, seven reversals, two were settlements, two were dismissals, and in one the result is unknown. Two came from Virginia, both being reversed. Rhode Island furnished ten, in two of which the judgments were affirmed, in seven reversed, and one case was dismissed. Georgia supplied but two, one being affirmed, and in the other the result is unknown. Maryland had one affirmance to three reversals.

<sup>1</sup> See list given by Hon. J. C. Bancroft Davis in Pamphlet already quoted, verified by an examination of the papers in the Office of the Clerk of the Supreme Court of the United States, and 2 Dallas' Reports, 1 to 42.

North Carolina four affirmances and five reversals and two dismissals. South Carolina, like Georgia, presents one affirmance and one unknown result. Connecticut out of fifteen cases counts one affirmance, ten reversals, four dismissals and one unknown result. New Jersey met with better fortune. the affirmances numbering six, the reversals four, the dismissals two and the unknown results three. Delaware furnished one affirmance and two settlements. New York does not appear in the list, owing to the fact that during the greater part of the war the British were in actual occupation of her only sea-port.

An examination of the records in each case, consisting of certified copies of the proceedings in the Courts below, and of depositions and proofs, leads to a general concurrence with the results reached by the appellate body. It is clear that the very large number of reversals is almost exclusively due to the mistaken views taken by the juries of the facts. In almost every case the verdict was swayed by local considerations and sectional prejudices. Each claimant of a prize naturally sought the Courts of his native State and there secured the favorable action of his fellow-citizens in the face of sometimes overwhelming adverse proof. Captures were made of friendly vessels, bound on innocent errands, as in the case of the *Thistle*, while in that of the *Elizabeth*, the Wardens of the Old North Meeting-House, in Boston, claimed that they had been despoiled of one iron spindle, two large iron clamps and three pounds of sheet-lead intended for the weather-vane. In another case the redoubtable General Putnam bitterly complains of the loss of a barrel of oysters, and in another several spinsters of Providence charged that the enterprising Captain Manly had seized as his prize a lot of household articles belonging to them. Conflicts, too, arose

out of joint captures made by vessels fitted out at the expense of two or more individual States, or of a State vessel and one cruising under Continental authority. The action of the Appellate Court seems in most instances to have been guided by sound sense, impartial justice, skill and experience in applying the rules of evidence and by a competent knowledge of prize law. Reversals upon pure questions of law were very rare, and it is a high tribute to the judicial knowledge, impartial conduct and correct judgment of Judge Francis Hopkinson, of the Admiralty Court of Pennsylvania, that out of forty-nine cases, in which he has reported his decrees, and the reasons upon which they were based, but nine appeals were taken, and in eight of these he was sustained.<sup>1</sup> A similar meed of praise is due to Timothy Pickering, Jr., Judge of the Maritime Court of Massachusetts, and to John Foster, Judge in Rhode Island of the Court erected for the Control of Prize Causes. The valor, enterprise and brilliant successes of the American Navy are imperishably preserved in the records of the Court whose career we have traced during a period which constitutes one of the most dramatic chapters in the history of the nation.

It has been well observed by a recent writer that it cannot be doubted that the Court of Appeals in Cases of Capture, though, as remarked by counsel in the case of *Jennings v. Carson*,<sup>2</sup> "unpopular in those States which were attached to trial by jury," had an educative influence in bringing the people of the United States to consent to a successor. It could hardly be that one hundred and eighteen

<sup>1</sup> The Works of Francis Hopkinson, Vol. III. "Judgments in the Admiralty of Pennsylvania," Philadelphia, 1792. Bee's Admiralty Cases, South Carolina (339-440).

<sup>2</sup> *Jennings v. Carson*, 4 Cranch, 9 (1807).

cases, though all in one restricted branch of judicature, should be brought by appeal from State Courts to a Federal tribunal without familiarizing the mind with the complete idea of a superior judicature, in Federal matters, exercised by Federal Courts.<sup>1</sup>

<sup>1</sup>Professor J. Franklin Jameson, "Essays in the Constitutional History of the United States," p. 44, to whose admirable paper, as well as to that of Hon. J. C. Bancroft Davis, I am deeply indebted, although in every instance I have consulted the original authorities and reached my own results.

## CHAPTER VI.

OTHER FEDERAL COURTS: COURTS FOR THE TRIAL OF FELONIES AND PIRACIES:  
COURTS FOR THE DETERMINATION OF CONTROVERSIES BETWEEN THE STATES  
AS TO BOUNDARY, TERRITORY AND JURISDICTION: CONTROVERSIES BETWEEN  
INDIVIDUALS CLAIMING LANDS UNDER GRANTS OF TWO OR MORE STATES: SUIT  
BY AN INDIVIDUAL AGAINST A STATE.

## COURTS FOR THE TRIAL OF FELONIES AND PIRACIES.

CLOSELY allied to the Admiralty jurisdiction which we have just reviewed was the grant to Congress by the Ninth Article of the Confederation of the sole and exclusive right and power of appointing Courts for the trial of piracies and felonies committed on the high seas. This power was exercised upon the 5th of April, 1781, by the passage of an Ordinance which, after reciting that it was expedient that such Courts should be speedily created and offenders brought to trial, ordained that every person who should commit any piracy or felony upon the high seas, or should be charged as accessory to the same, either before or after the fact, should be proceeded against by grand and petit juries, according to the course of the common law. No separate Court was established, but the justices of the Supreme or Superior Court of judicature, and the judge of the Court of Admiralty of the several and respective States, or any two or more of them, were designated as being constituted and appointed judges for hearing and trying such offenders.<sup>1</sup> In States where there

<sup>1</sup> Journals of Congress, Vol. VII, p. 65.

were several Judges of the Admiralty, the Governors were directed to commission one of them exclusively to join in performing these duties. Process was regulated; the pains of death, forfeiture of lands, goods and chattels were prescribed as punishments, and the benefit of clergy was denied whenever the same was taken away for like offences committed upon land. The ordinance was subsequently amended on March 4th, 1783, but merely in minor particulars.<sup>1</sup>

#### COURTS FOR THE TRIAL OF CONTROVERSIES BETWEEN STATES.

The second important class of cases in which the Continental Congress was called upon to exercise judicial powers, or, what was in effect the same thing, delegate judicial authority by erecting courts, was in controversies between the States as to territory and boundaries, or between individuals claiming lands under grants from different States. These naturally attracted much attention because of the questions of sovereignty involved, which had raged with such fierceness as in some instances to lead to bloodshed, and to conditions of civil disturbance which threatened to impair the harmony of the Union. Of such grave importance had the matter become, and so apparent was the necessity for National control, that in the Ninth Article of Confederation, adopted by Congress on the 15th of November, 1777, which contained a specific enumeration of Federal powers, it was provided that the United States in Congress assembled should be the last resort on appeal in all disputes and differences then subsisting, or that might arise thereafter, between two or more States con-

<sup>1</sup>Journals of Congress, Vol. VIII, p. 109.



cerning boundary, jurisdiction or any other cause whatsoever. A mode of establishing a Court in each case was specifically prescribed, and all controversies concerning the private right of soil claimed under different grants of two or more States were to be settled, as near as might be, in the same manner. It is interesting to observe that in the draft of the Articles of Confederation presented by Dr. Franklin on the 21st of July, 1775, the matter is but lightly touched, the only provision being that the power and duty of Congress should extend in this particular to "the settling all disputes and differences between colony and colony about limits, or any other cause, if such should arise."<sup>1</sup> It was not until the draft by John Dickinson appeared on the 12th of July, 1776, that the matter began to assume the definite form in which it was finally adopted.<sup>2</sup>

The change is due to the fact that in October, 1775, the controversy between Connecticut and Pennsylvania as to the territory known as Wyoming had proceeded to such extremities as to attract widespread attention. At that time the delegates of the smaller State informed Congress that they had met those from Pennsylvania, but had been unable to adjust the disputes between the people of the two colonies on the waters of the Susquehanna, which had led to actual war, and asked for a special committee to consider the matter and report.<sup>3</sup> John Rutledge, Samuel Chase, Thomas Jefferson, James Kinsey and Stephen Hopkins were formally appointed, and, in December, Congress, by resolution, recommended that

<sup>1</sup> Franklin's Draft, Article V. History of the Confederation. Secret Journals of Congress, Vol. I, p. 26, par. 9.

<sup>2</sup> Compare Franklin's Draft, Article V, with Dickinson's Article XVIII, and the Final Article IX, as adopted. Secret Journals, pp. 268, 269, 281, 340.

<sup>3</sup> Journals of Congress, Vol. I, pp. 220, 221.

the contending parties cease hostilities and every appearance of force, until the dispute could be legally determined; that all property taken should be restored to the original owners, that there should be no interruption to freedom of travel, and that all prisoners on either side should be permitted to return to their homes; that as far as possible the former status should be re-established, and that nothing in these recommendations should prejudice the claims of either party.<sup>1</sup> The territory in dispute embraced one degree of latitude and five degrees of longitude; it contained more than five million acres of land, rich in hidden and unknown treasures of coal, iron and oil; sheltering in its bosom that fair and fertile valley made desolate by Indian massacre, and immortalized in the verse of one of the most gifted of English poets; a region fascinating to the artist as well as to the historian, beautiful in scenery, romantic in traditions, a royal heritage, which Connecticut pioneers, under the terms of a charter, both boundless and indefinite, had begun to colonize as early as 1753. In 1768 they came into conflict with settlers under the Penns, who had obtained the Indian title, and who claimed that they were within the bounds prescribed by the Charter of Charles II. Then ensued a contest for control, the erection of stockades, the building of forts, sieges in mid-winter, storming parties, taking of prisoners, stratagems, ruses and surprises, until, in 1771, the Connecticut men were left in quiet possession. They established a government, laid out townships, formed settlements, levied and collected taxes, passed laws for the direction of civil suits and for the punishment of crimes, and maintained themselves in peace and prosperity, until taken under the law and protection of the

<sup>1</sup>Journals of Congress, Vol. I, p. 299.

"ancient and high-standing" colony of Connecticut, by the action of her General Assembly, in erecting all the territory from the River Delaware to a line fifteen miles west of the Susquehanna into a town, with all the corporate power of other towns of the colony, to be called Westmoreland, attaching it to the county of Litchfield. It was this effort on the part of Connecticut as a State to assert and exercise her sovereignty over this region that was resisted by Pennsylvania. Under the orders of the Government, Colonel Plunkett, with a force of about five hundred men, and a train of boats and stores of ammunition, moved up the North Branch of the Susquehanna to drive off the Connecticut settlers from the Wyoming country. About three hundred of these met him at Naticoke, and repulsed him, with some loss of life on both sides. It was at this point that Congress intervened in the manner stated, and recommended to Connecticut that she should not introduce any new settlers to the disputed lands until the further order of Congress. Peace once more reigned, but the Articles of Confederation having been finally ratified by all the States, and entered upon the Journals in March, 1781, by which Congress was invested with full authority and jurisdiction over controversies of this nature, Pennsylvania, through her Supreme Executive Council, presented in the following November a petition respecting the dispute and prayed a hearing. Congress assigned the fourth Monday in June following for the appearance of the States, and directed notice to be given. On the day appointed the States appeared by their agents. An effort was made by Connecticut to postpone the proceedings until "after the termination of the present war," without success, and, after further objections on her part, which were overruled, the agents of the two States were directed "to appoint, by joint consent, commissioners or

judges, to constitute a Court for hearing and determining the matter in question." On the 12th of August, 1782, Congress was informed that they had agreed upon the Hon. William Whipple, of New Hampshire, Major-General Nathaniel Greene, of Rhode Island, Hon. David Brearley and William Churchill Houston, Esq., of New Jersey, Hon. Cyrus Griffin and Joseph Jones, Esq., of Virginia, and Hon. John Rutledge, of South Carolina, any five or more of whom should constitute the Court. Subsequently, Mr. Thomas Nelson, of Virginia, and Mr. Welcome Arnold, of Rhode Island, were substituted for General Greene and Mr. Rutledge. It was agreed that the Court should sit at Trenton, in the following November. On the 18th of that month, a quorum then being present, the Court was organized and entered upon its work, with Messrs. Whipple, Arnold, Brearley, Houston and Griffin as its members. The judges were sworn before the Hon. Isaac Smith, one of the justices of the Supreme Court of New Jersey, and John Neilson, Esq., was appointed Clerk. The Court was in session for forty-two days. The combat began by a motion on the part of Connecticut that notice be given to the tenants in possession of the disputed lands to appear and defend. It was ruled that this would be outside of the proper construction of the Ninth Article of Confederation and the terms and design of the commissions issued to the judges. Other dilatory motions were then made, all of which were resisted by Pennsylvania, and then evidence both oral and documentary was offered. Fifteen days were devoted to the arguments, the chief one in behalf of Pennsylvania being made by James Wilson, consuming four days, and in behalf of Connecticut, by William Samuel Johnson, who spoke for three days. The titles on both sides were regularly deduced, by which it appeared that Connecticut claimed that

the northern bounds and limits of the Grant to William Penn interfered with and overran a portion of the western lands, granted to Connecticut, for the space of one degree of latitude throughout the whole breadth of Penn's Grant, and that Penn had notice of the fact at the time of taking out his patent. Both parties claimed to have extinguished the Indian titles, and Connecticut showed that her settlers had located and improved their lands, and were in a condition to extend their settlements, and had done so under the sanction of her legislature. Pennsylvania claimed that the Connecticut settlers were intruders, who had violently thrust themselves within the undoubted boundaries of Penn's Grant, and that they had been aided and abetted by their State in defiance of law and justice; besides this, Connecticut had been silent for a century as to her rights before asserting them, and was equitably estopped; the terms of Penn's charter were distinct and clear, while those of the adverse grant were indistinct and indefinite. On December 30, 1782, the Court pronounced the following judgment: "We are unanimously of opinion that the State of Connecticut has no right to the lands in controversy. We are also unanimously of opinion that the jurisdiction and pre-emption of all the territory lying within the charter boundary of Pennsylvania, and now claimed by the State of Connecticut, do of right belong to the State of Pennsylvania."<sup>1</sup>

<sup>1</sup>The mass of literature relating to the "Connecticut Claims" is very great, but the result is admirably stated in a paper by the Hon. Henry M. Hoyt, Ex-Governor of Pennsylvania, read before the Historical Society of Pennsylvania, November 10, 1879, entitled "Brief of a Title in the Seventeen Townships in the County of Luzerne: A Syllabus of the Controversy between Connecticut and Pennsylvania." I have traced the matter through the Journals of Congress, Vol. VIII, p. 44, *et seq.* and the "History of Wyoming," by Charles Miner, Esq., Philadel-

Fourteen years later it was discovered, from a letter written by the Hon. Cyrus Griffin, a member of the Court, and then a Federal Judge in the District of Virginia, that it had been agreed by all the Commissioners before determining the controversy, that the reasons for the determination should never be given, and that the minority should concede to the determination as the unanimous opinion of the Court.<sup>1</sup> The decision, which was the only one rendered in controversies between States, under the Articles of Confederation, was acquiesced in by Connecticut, and is pointed to exultingly by Bancroft as a shining example of the beneficence of the authority of the Union in quelling the wild strife between contending sovereignties. The judgment was approved by Congress, and constitutes the first settlement of a controversy between States by the decree of a Court established by the United States.

The owners of the private right of soil under Connecticut felt that they were not concluded by the decision, even though they did not know at that time that such was the view of the Court. On the 23d of January, 1784, upon the report of a Committee, consisting of Thomas Jefferson, Richard Henry Lee and Hugh Williamson, to whom the petition of Colonel Zebulon Butler and others had been referred, Congress resolved to institute a court for the trial of Butler's title, who claimed under Connecticut, and who asserted that he was

phia, 1845, a work of profound original research. See also Alexander Johnston's "History of Connecticut," American Commonwealth Series, pp. 275, 284. See also 131 United States Reports, Appendix xix, by Hon. J. C. Bancroft Davis.

<sup>1</sup>The letter was first produced upon the trial of Vanhorne's Lessee *v.* Dorrance, 2 Dallas, p. 304 (1795), tried before Paterson, Judge of the Supreme Court of the United States, sitting with Peters, Judge, in April, 1795. The letter is printed in full by Governor Hoyt, "Brief of a Title, &c.," p. 46.

disturbed by others claiming under Pennsylvania,<sup>1</sup> but proceedings were subsequently suspended until the claimants should particularize their claims and show affirmatively that they were entitled to a court, for, as was pointed out, the trial of private right of soil could only be claimed by those who made it clear that there was a conflict between grantees of two or more States.<sup>2</sup> In September the resolution instituting the Court was repealed, as Colonel Butler could not describe with sufficient certainty the tract claimed, nor name with particularity the private adverse claims under grants from Pennsylvania.<sup>3</sup> "The Pennamite and Yankee War" then began. The militia of Pennsylvania was mustered to enforce the writs of Pennsylvania Courts, the property of the Connecticut men was destroyed, their boundary lines were obliterated and their rights generally ignored, when crowding into the distracted region, under the leadership of Ethan Allen, flushed with his success as the founder of Vermont, came many Green Mountain Boys, in the hope of establishing a new State, which they would force Congress and Pennsylvania to recognize. Affairs soon reached a crisis, in which Colonel John Franklin was arrested for high treason, upon a warrant issued by Chief Justice McKean, and the celebrated Timothy Pickering, once Judge of the Admiralty in Massachusetts, Quartermaster-General of the Continental Army, and afterwards Secretary of State of the United States, was kidnapped to secure his release. But Pennsylvania dissipated the clouds of civil war by a series of Acts dictated by a spirit of justice and toleration, by which the lands of actual settlers were

<sup>1</sup> Journals of Congress, Vol. IX, pp. 30, 31.

<sup>2</sup> Journals of Congress, *Ibid.* p. 57.

<sup>3</sup> Journals of Congress, Vol. IX, Appendix.

confirmed to them, and the district was erected into the County of Luzerne.

Other "controversies" arose, which reached various stages of development, although none of them arrived at a formal decree, but were happily settled by the contending States.

Pennsylvania and Virginia differed as to the famous line "commonly called Mason and Dixon's line," and the matter was brought before Congress on the 27th of December, 1779. That body recommended peace and amity, and in the spirit of that recommendation the subject was withdrawn from the passionate debates of statesmen and the learned opinions of judges, and was consigned to the tender care of the reverend clergy in Virginia and learned college professors in Pennsylvania, aided by laymen who knew little of the exciting frays of politics. After some correspondence, which grew out of an agreement entered into at Baltimore, the Rev. James Madison, the Rev. Robert Andrews, Mr. John Page and Mr. Thomas Lewis, on the one side, and Dr. John Ewing, David Rittenhouse, John Lukens and Thomas Hutchins, on the other, were appointed Commissioners, and on the 23d of August, 1784, reported that the line had been established and that the Ohio River had been reached.<sup>1</sup>

New Jersey and Virginia also had their differences respecting a tract of land called Indiana in the territory Northwest of the Ohio, but the affair was settled by the deed of cession presented to Congress by Virginia on the 1st of March, 1784, and accepted by that body. No Court was ever convened, and a motion to commit a petition presented by Colonel George Morgan, agent for New Jersey, praying for a hearing, was lost.<sup>2</sup>

<sup>1</sup> 131 United States Reports, Appendix, liii, liv.

<sup>2</sup> Journals of Congress, Vol. IX, p. 45.



Massachusetts and New York appeared at the bar of Congress upon the 3d of June, 1784, upon a petition presented by the legislature of the first-named State praying for the appointment of a Federal Court to adjudicate a claim made by the latter to land lying between the rivers Merrimac and Charles.<sup>1</sup> A day was fixed and notice given. Massachusetts appeared by John Lowell and James Sullivan; New York by James Duane, John Jay, Robert R. Livingston, Egbert Benson and Walter Livingston, all of whom presented their credentials.<sup>2</sup> They were directed by Congress to appoint by joint consent commissioners or judges, and after some delay they agreed upon Robert Hanson Harrison and Thomas Johnson, of Maryland; John Rutledge, of South Carolina; George Wythe, William Grayson and James Monroe, of Virginia; George Read, of Delaware, and Isaac Smith and William Paterson, of New Jersey, any five of whom were to constitute a quorum, and Congress was empowered to fill all vacancies in case of refusals to serve. Harrison, Rutledge and Grayson declined, and their places were taken by John Sitgreaves and Samuel Johnson, both of North Carolina, and William Fleming, of Virginia. The City of Williamsburg was designated as the place for the meeting of the Court. Months rolled away without action, and finally Congress was petitioned to require the attendance of a quorum and to fix a day certain. But by a belated entry on the 8th of October, 1787, it appeared that the controversy had been settled by the action of the States themselves as far back as the previous December, whereupon the commissions of the Judges were revoked and all proceedings stayed.<sup>3</sup>

<sup>1</sup> Journals of Congress, Vol. IX, p. 221.

<sup>2</sup> *Ibid.* Vol. X, pp. 9-15.

<sup>3</sup> *Ibid.* Vol. X, p. 254; *Ibid.* Vol. XI, p. 58.

South Carolina and Georgia contended as to their jurisdictions upon the upper waters of the Savannah River at the confluence of the Tugaloo and Keowee, and on the 4th of September, 1786, John Kean, Charles Pinckney and John Bull appeared as agents for South Carolina, and William Houstoun, George Walton and William Few for Georgia. The case is especially interesting because it presents the only instance of inability on the part of the State agents to agree upon the composition of a Court, and a consequent reference to Congress to strike a Court in the manner provided for in the Ninth Article of Confederation.<sup>1</sup> Three persons were named by Congress from each of the thirteen States, and from this list the agents of each party alternately struck one, until the number was reduced to thirteen; nine were then drawn by lot from a box in the presence of Congress. Alexander Contee Hanson, James Madison, Robert Goldsborough, James Duane, Philemon Dickinson, John Dickinson, Thomas McKean, Egbert Benson and William Pynchon were chosen. New York City was selected as the place of meeting, but no record exists to show that the Court ever convened. The States settled their differences by a compact signed on the 28th of April, 1787, several articles of which were subsequently brought before the Supreme Court of the United States.<sup>2</sup>

A triangular contest was waged between New Hampshire and Vermont, New York and Vermont, and Massachusetts and Vermont, for the control of the region lying between Lake Champlain and the Connecticut River, which had been conveyed by Wentworth, the only royal governor in New England, under the seal of New Hampshire, and be-

<sup>1</sup>Journals of Congress, Vol. XI, pp. 157-159.

<sup>2</sup>South Carolina v. Georgia, 93 U. S. Rep. pp. 5-6 (1876).

came known as the New Hampshire Grants. French, Dutch and English titles conflicted. In 1750 France, who had control of the Lake, sought to establish herself in the Green Mountains; New York pushed her pretensions to the banks of the Great River, under the proclamation of Cadwallader Colden, then acting as Governor, and appealed to the great crown lawyers of England for support; while the grantees under New Hampshire obtained a royal mandate that the governor of New York "do not, upon pain of His Majesty's highest displeasure, presume to make any grants whatsoever of any part of the land described, until His Majesty's further pleasure shall be known concerning the same."<sup>1</sup>

No attention, however, was paid to this impressive warning. The militia was called on to support Colden's authority: new grants were made and actions of ejectment continued to be pressed in the Courts at Albany. To these the Green Mountain Boys, under the rugged leadership of the hero of Ticonderoga and Crown Point, gave no heed, but rallied at Bennington and organized a convention. Here they erected a sign expressive of their defiance. On the very borders of the disputed territory, a post twenty-five feet high bore on its top a huge catamount's skin, stuffed, its teeth displayed towards the hated province of New York. On the 15th of January, 1777, the name of Vermont was adopted and independence of New York was declared. A constitution was framed, State officers were chosen, Thomas Chittenden was elected Governor, and the new order of affairs was recognized by New Hampshire. New York, however, was not disposed to relinquish jurisdiction so readily. On the 29th of May, 1779, a letter from

<sup>1</sup> Bancroft's "History of the United States," Last Revision, Vol. II, p. 361.  
W. H. Carpenter and T. S. Arthur, "History of Vermont," p. 32.

Governor George Clinton was presented to Congress, accompanied by other papers touching the controversy, which were considered in Committee of the Whole. Messrs. Ellsworth, Edwards, Witherspoon, Atlee and Root were directed to visit the inhabitants of the district and ascertain the reasons why they refused to continue as citizens of the States which had theretofore exercised jurisdiction, and it was declared that as Congress were in duty bound, on the one hand, to preserve inviolate the rights of New York and New Hampshire, so, on the other, they would always be careful to provide that the justice due to the States did not interfere with the justice which might be due to individuals.<sup>1</sup> By September it appeared that animosities had proceeded so far as to endanger the internal peace of the United States, and that it was indispensable for Congress to interpose for the restoration of quiet and good order. As the people of the New Hampshire grants denied all jurisdiction on the part of neighboring States, a doubt arose as to the right of Congress to intervene without additional authority; hence it was resolved and "most earnestly recommended" to the States of New Hampshire, Massachusetts Bay, and New York forthwith to pass laws expressly authorizing Congress to hear and determine all differences between them relative to their respective boundaries, in the mode prescribed by the Articles of Confederation, and that they also refer all disputes with the people of the district, and also authorize the determination of differences between the grantees of the respective States touching the title to lands. New York responded by the Act of October 21st, 1779, and New

<sup>1</sup>Journals of Congress, Vol. V, pp. 177, 181. Carpenter's "History of Vermont," Chaps. III and V. E. H. Roberts' "History of New York," Vol. II. pp. 401, 406.

Hampshire by an Act passed in November. Massachusetts, having no real interest in the controversy, took no action. "The people of the district" would not submit, however, but made various efforts to be admitted as a State. Their attitude, which converted the question into a political rather than a judicial matter, was upheld by the secret sympathy of New Jersey, Rhode Island and Maryland, and rendered the organization of a Court impossible.<sup>1</sup> Many futile discussions were held in Congress, which were participated in by the leading statesmen of the day, and at one time the conduct of the "pretended State of Vermont" was severely animadverted upon, and restitution required to be made to persons who had been condemned to banishment and confiscation of property. In 1781 Massachusetts assented to the recognition of Vermont, New Hampshire soon followed, and New York in 1790. On the 18th of February, 1791, she was admitted to the sisterhood of States, and became under the Constitution a member of the Federal Union.

#### SUIT AGAINST A STATE.

A solitary instance occurs of the suit of a private citizen against a State in the Courts of another State. A foreign attachment was issued against the Commonwealth of Virginia in the Court of Common Pleas of Philadelphia County at the suit of Simon Nathan, and a quantity of clothing, imported from France, belonging to that State, was attached. The delegates in Congress from Virginia, conceiving this a violation of

<sup>1</sup>Journals of Congress, Vol. V, pp. 276, 283; *Ibid.* Vol. VI, pp. 16-128; *Ibid.* Vol. VII, pp. 129, 189, 210, 228, 231, 244, 260; "The Federalist," VII; 131 U. S. Reports, Appendix lii.

the law of nations and an affront to the dignity of a sovereign, applied to the Supreme Executive Council of Pennsylvania, by whom the Sheriff was ordered to surrender the goods. The counsel for the plaintiff, finding that the writ was suppressed, obtained a rule nisi that the Sheriff should make a return. The question was elaborately argued, and after consideration the rule was discharged, on the ground that every kind of process against a sovereign was a violation of the law of nations, and that no ministerial officer could be compelled to serve or return a void writ.<sup>1</sup>

<sup>1</sup> Simon Nathan *v.* Virginia, 1 Dallas, 77, in *Notes*.

## CHAPTER VII.

DEFECTS OF THE OLD JUDICIAL SYSTEM: INSTANCES OF JUDICIAL FREEBLENES ON  
THE PART OF CONGRESS.

WE have now passed in review the various fields of controversy over which the Continental Congress, both before and after the adoption of the Articles or Confederation, exercised or attempted to exercise judicial control. They are few in number and limited in extent, presenting features which are but paltry in comparison with that boundless and richly diversified region developed and cultivated with such assiduity during the past century in the domain of Constitutional law. Cases of prize and capture, felonies and piracies on the high seas, controversies between States, and disputes between individuals claiming lands under grants from different States constitute but an insignificant portion of that ample and noble jurisdiction now exercised by the Courts of the United States. But no one can deny the value of the work done in those rugged fields, or over-estimate the importance of the truths gleaned by the statesmen of the Revolution, in whose awakening minds the conviction gained strength that in order to preserve harmony, establish uniformity, and enforce obedience there was a paramount necessity of clothing the central government with complete control of all those questions which the stern logic of events had proved could not be safely left to the capricious and irregular action of the States. Conflicting regulations, the numerous progeny of local prejudices and narrow views, had bred evils

which more than once combined to weaken or destroy the union. Fragmentary grants, imperfect delegations of power, timid concessions and illiberal restrictions lay like heavy fetters upon the limbs of the nation, impeding freedom of movement and crippling energies which might have been exercised for the public good. The vital defect in the old Congressional judicial system—if such it could be called when so, stunted and misshapen—lay in the fact that it depended entirely upon State officers to enforce the judgment of the Appellate tribunal when it reversed the decree of a State Court. State Courts refused to enforce the rights of property acquired under its decrees, and we have seen how powerless the higher Court was rendered in the cases of the *Susannah* and the sloop *Active*. The necessity for a competent judicial power co-extensive with the legislative authority of the Union must have been sorely felt, and it only requires reference to a few instances, traceable through the Journals of Congress, in order to arrive at the conclusion that in very many particulars Congress, both as to its legislative functions and its judicial authority, lay prostrate at the feet of the States. Although *a priori* it would be supposed that the power of punishing infractions of the law of nations would have been vested exclusively in Congress, yet we find that in August, 1779, it was resolved that the authorities of Pennsylvania be informed that any prosecution which might be directed should be carried on at the expense of the United States in the State Courts.<sup>1</sup> And in Sweer's case, which occurred in 1778,<sup>2</sup> counsel were employed by Congress to prosecute in the State Court one who was indicted for altering a receipt given by the vendor

<sup>1</sup> Journals of Congress, Vol. V, p. 367.

<sup>2</sup> 1 Dallas, 41.



of goods with intent to defraud the United States. It was urged before Chief Justice McKean, upon a motion in arrest of judgment, that "at the time of the offense charged the United States were not a body corporate known in law." Although this assertion was disregarded by the Court, which declared that "from the moment of their association the United States necessarily became a body corporate; for there was no superior from whom that character could otherwise be derived," yet it was plain that this mock sovereign was without the power of self-defence except so far as assistance was extended by the friendly hand of a State constituting but a single member of the Union.<sup>1</sup>

In November, 1781, Congress recommended to the Legislatures of the several States that they should pass laws punishing infractions of the law of nations, and speedily erect tribunals, or clothe those already existing with power to decide on what constituted such an offence, and to expressly authorize suits for damages by the parties injured, or for compensation to the United States for damages sustained by them from an injury done to a foreign power by a citizen.<sup>2</sup>

The States do not seem to have responded, but, in 1784, De Longchamp was convicted and sentenced, in the Court of Oyer and Terminer of Pennsylvania, for committing a violation of the law of nations by insulting M. Marbois, the Secretary of the French Legation, and for committing assault and battery upon him, the Court declaring that the law of nations formed a part of the municipal law of Pennsylvania. This they enforced without the aid of a statute.<sup>3</sup> After the

<sup>1</sup> See also Journals of Congress, Vol. IV, p. 494; *Ibid.*, Vol. V, p. 283. *Respublica v. Teischer*, 1 Dallas, 335 (1788).

<sup>2</sup> See Journals of Congress, Vol. VII, p. 181.

<sup>3</sup> *Respublica v. De Longchamp*, 1 Dallas, p. 111 (1784).

arrest of the offender the Supreme Executive Council of Pennsylvania gave information of the fact to Congress in a letter, and requested their attention, but nothing seems to have come of the application, and it was left to the State Court to take the action stated.<sup>1</sup>

Congress also proved incapable of enforcing judicially its interpretation of the crime of treason. Although upon the 24th of June, 1776, after independence had been resolved upon, the terms allegiance and treason had been defined, the latter consisting in "levying war against any of the colonies, or being adherent to the King of Great Britain or enemies of the said colonies, giving to him or them aid or comfort," yet it was found to be necessary to recommend to the legislatures of the colonies that they should pass laws for punishing persons "provably attainted of open deed by people of their condition."

Pennsylvania acted promptly, and under her laws we find several instances of persons convicted in the year 1778.<sup>2</sup>

Although the power to establish and regulate Post-Offices throughout the United States had been vested in Congress by the Articles of Confederation, and an Ordinance of October, 1782, imposed penalties for official misdemeanors, which were made recoverable by action of debt in the name of the Postmaster-General in the State where the offence was committed, yet Congress had no power to exact obedience or punish disobedience by pecuniary mulcts or otherwise, but these were solely dependent upon the laws and tribunals of the several States. In fine, whenever it became necessary to secure the interests

<sup>1</sup> Journals of Congress, Vol. IX, Committee of the States, p. 2.

<sup>2</sup> *Respublica v. Molder, Id. v. Molin, Id. v. Carlisle, Id. v. Roberts, 1 Dallas, pp.*

of the nation, an application to the State Legislatures was inevitable.

Another example occurs in the appeal, in 1782, of Congress to the States to pass laws to empower Commissioners, appointed by Congress, to settle the accounts of the Military Department, to call for witnesses and examine them on oath touching their accounts.<sup>1</sup> It was even necessary to pass a resolution requesting the States to enact laws to enable the United States to recover from individuals debts due and effects belonging to them.<sup>2</sup> And, in July, 1784, the Committee of States, which sat during the recess of Congress, complained that none of the State Legislatures had made the provisions requested, by which the interests of the United States had already suffered. As further loss of time would be injurious, they again earnestly requested the adoption of measures to enable the United States to sue for and recover their debts, effects and property, and such damages as they had sustained.<sup>3</sup>

It is clear, then, that in cases of vital importance to the nation, the State jurisdictions retained or acquired a power utterly at variance with the real interests of the nation, except in disputes between the States, questions arising under grants of land by two or more States, and in cases of prize and capture, and piracies and felonies on the high seas. The State Courts, it is true, exercised no jurisdiction in causes arising from impost or revenue, for none such existed prior to the present Constitution of the United States. State imposts existed, and the State tribunals entertained the causes arising out of them. Nor was there under the Confederation

<sup>1</sup> Journals of Congress, Vol. IV, p. 83; *Ibid.*, Vol. V, p. 296; *Ibid.*, Vol. VII, p. 298.

<sup>2</sup> Journals of Congress, Vol. VII, p. 298.

<sup>3</sup> Journals of Congress, Vol. IX, Committee of the States, p. 18.

any tribunal vested with the appellate power which, before the Revolution, had been exercised by the King in Council over the decisions of the courts in the respective Colonies. That was a destiny reserved for the Supreme Court of the United States.

We are now to see how the various fountains of authority, which we have traced to their original springs, were directed by the strong hands and wise heads of the Framers of the Constitution of the United States into the channel of Federal jurisdiction, until small and feeble rills broaden into deep and majestic tributaries of that lordly current which sweeps on through the Union, visiting without inundating every corner of the Republic, and whose waters are for the healing of the Nation.

## PART II.

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### THE ESTABLISHMENT OF THE SUPREME COURT.

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#### CHAPTER VIII.

DEFECTS OF THE ARTICLES OF CONFEDERATION: WANT OF A FEDERAL JUDICATURE: VIEWS OF HAMILTON, MADISON AND OTHERS: THE FEDERAL CONVENTION: PLANS FOR A NATIONAL JUDICIARY: COURSE OF THE DEBATE: FINAL FORM OF PLAN ADOPTED.

THE want of a Federal Judicature, having cognizance of all matters of general concern in the last resort, especially those in which foreign nations and their subjects were interested, was pointed out by Alexander Hamilton as early as May, 1783, as a grievous defect in the Articles of Confederation. He predicted the infringement of national treaties, the violation of national faith and the disturbance of public tranquillity, by the interference of the local regulations of particular States militating, directly or indirectly, against the powers vested in the Union.<sup>1</sup> In "The Federalist" he dwelt upon the want of a judiciary power as a circumstance which crowned the defects of the Confederation:

"Laws are a dead letter," said he, "without courts to expound and define their true meaning and operation. The treaties of the United

<sup>1</sup> Alexander Hamilton, "Resolutions for a General Convention 1783, The Federalist, The Continentalist and other Papers," edited by John C. Hamilton, p. 4.

States, to have any force at all, must be considered as part of the law of the land. Their true import, as far as it respects individuals must, like all other laws, be ascertained by judicial determination. To produce uniformity in these determinations, they ought to be submitted, in the last resort, to one Supreme Tribunal. And this tribunal ought to be instituted under the same authority which forms the treaties themselves." He adds: "The treaties of the United States, under the present Constitution, are liable to the infractions of thirteen different legislatures, and as many different Courts of final jurisdiction, acting under the authority of those legislatures. The faith, the reputation, the peace of the whole Union, are thus continually at the mercy of the prejudices, the passions and the interests of every member of which these are composed. Is it possible that foreign nations can either respect or confide in such a government? Is it possible that the people of America will longer consent to trust their honor, their happiness, their safety, on so precarious a foundation." <sup>1</sup>

James Madison entertained similar views. In a letter dated the 16th of April, 1787,—a month before the meeting of the Federal Convention,—addressed to Washington, he says:

"The National supremacy ought also to be extended, as I conceive, to the judiciary department. If those who are to expound and apply the laws are connected by their interests and their oaths with the particular States wholly, and not with the Union, the participation of the Union in the making of the laws may be possibly rendered unavailing. It seems, at least, necessary that the oaths of the judges should include a fidelity to the general, as well as local, Constitution; and that an appeal should lie to some national tribunal in all cases to which foreigners, or inhabitants of other States, may be parties. The admiralty jurisdiction seems to fall within the purview of the National Government." <sup>2</sup>

The same thoughts were working in the minds of men

<sup>1</sup> The Federalist, XXII.

<sup>2</sup> Madison's "Debates and Correspondence," Vol. II, p. 714.

less renowned. William R. Davie wrote to a friend: "Be so good as to favor me, by the next post, with your opinion how far the introduction of judicial powers, derived from Congress, would be politic or practicable in the States;" and Richard Dobbs Spaight expressed a sentiment which was becoming common:

"There is no man of reflection, who has maturely considered what must and will result from the weakness of our present Federal Government, and the tyrannical and unjust proceedings of most of the State Governments, if longer persevered in, but must sincerely wish for a strong and efficient National Government."<sup>1</sup>

With such views all four of the gentlemen named entered the Federal Convention. The main business of that body was opened on the 29th of May, 1787, by Edmund Randolph, the Governor of Virginia, who had been selected by his colleagues, on account of his high position, distinguished talents and skill as a public speaker, to present a series of fifteen resolutions, embodying in a concrete form, for the convenience of modification and discussion, those leading ideas of reform proposed as the basis of an efficient Constitutional system. These resolutions were the result of a consultation among Washington, George Mason, Randolph, Dr. McClurg, Madison, George Wythe and John Blair, the two latter being then Judges of the Supreme Court of Appeals of Virginia. The clause relating to the judiciary provided:

"That a National judiciary be established; to consist of one or more supreme tribunals, and of inferior tribunals; to be chosen by the National

<sup>1</sup> Letter of Davie to Iredell, and of Spaight to Iredell. McRee's "Life of Iredell," Vol. II, pp. 161-168.

Legislature ; to hold their offices during good behavior, and to receive punctually, at stated times, fixed compensation for their services, in which no increase or diminution shall be made so as to affect the persons actually in office at the time of such increase or diminution. That the jurisdiction of the inferior tribunals shall be to hear and determine, in the first instance, and of the supreme tribunal, in the *dernier resort*, all piracies and felonies on the high seas ; captures from an enemy ; cases in which foreigners, or citizens of other States, applying to such jurisdictions, may be interested ; or which respect the collection of the National revenue, impeachment of any National officers, and questions which may involve the National peace and harmony.”<sup>1</sup>

The foregoing constituted a part of "the Virginia Plan."

The plan presented by Mr. Paterson, known as “the New Jersey Plan,” differed in some important particulars. It provided for but one Court, which was to be Supreme. No inferior tribunals were mentioned. The judges were to be appointed by the Executive, and the Judiciary so established were to have authority to hear and determine, in the first instance, on all impeachments of Federal officers, and by way of appeal, in the *dernier resort*, in all cases touching the rights of ambassadors; in all cases of captures from an enemy; in all cases of piracies and felonies on the high seas; in all cases in which foreigners might be interested; in the construction of any treaty or treaties, or in questions which might arise on any of the acts for the regulation of trade or the collection of the Federal revenue; and it was provided that none of the judiciary should, during the time they remain in office, be capable of receiving or holding any other office or appointment during the term of service, or for thereafter.<sup>2</sup>

<sup>1</sup>The Madison Papers—Supplement to Elliott's Debates, Vol. V, p. 128.

<sup>2</sup> *Ibid.* p. 192.



Both plans adopted the tenure of good behavior, and a fixed and immutable compensation.

With these plans before them, the Convention, composed chiefly of lawyers, with four judges among them, proceeded to discussion and elaboration. The resolution that a national judiciary be established passed unanimously, and a further clause that it should "consist of one supreme tribunal and of one or more inferior tribunals" passed in the affirmative. A few days later the words "one or more" were stricken out. A vigorous debate then ensued upon the method of selecting the judges. Mr. Wilson, of Pennsylvania, opposed their appointment by the national legislature. Experience, he declared, showed the impropriety of such appointments by numerous bodies. Intrigue, partiality and concealment were the necessary consequences. A principal reason for unity in the executive was that officers might be appointed by a single responsible person. To this John Rutledge replied that he was by no means disposed to grant so great a power to any single person. The people would think that we were leaning too much towards monarchy. Madison preferred a middle course. He disliked the election of the judges by the Legislature, and was not satisfied with referring the appointment to the Executive. He hinted that he inclined to a selection by the Senate. For the time being his views were adopted without dissent. Rutledge then moved to expunge the clause relating to inferior tribunals. He was against establishing any national tribunal except a single supreme one, and he argued that the State tribunals might and ought to be left, in all cases, to decide in the first instance, as the right of appeal to the supreme national tribunal was sufficient to secure the national rights and uniformity of judgments; that it was making an unnecessary encroachment on the jurisdiction

of the States, and creating unnecessary obstacles to their adoption of the new system. He was sustained by Roger Sherman, who dwelt chiefly on the expensiveness of having a new set of Courts, when the existing State Courts would answer the same purpose. Madison replied with great spirit that,—

“Unless inferior tribunals were dispersed throughout the Republic with final jurisdiction in many cases, appeals would be multiplied to a most oppressive degree; that, besides, an appeal would not in many cases be a remedy. What was to be done after improper verdicts, in State tribunals, obtained under the biased directions of a dependent judge, or the local prejudices of an undirected jury? To remand the cause for a new trial would answer no purpose. To order a new trial at the Supreme Bar would oblige the parties to bring up their witnesses, though ever so distant from the seat of the Court. An effective judiciary establishment, commensurate to the legislative authority, was essential. A government without a proper executive and judiciary would be the mere trunk of a body without arms or legs to act or move.”

The same view was taken by Wilson and Dickinson; the motion of Rutledge, however, prevailed. But Dickinson, in a powerful speech, returned to the question, and contended that if there was to be a national legislature, there ought to be a national judiciary, and pointed out that there was a wide distinction between the absolute establishment of inferior tribunals and the giving of a discretion to the legislature to establish or not to establish them. He therefore moved “that the national legislature be empowered to institute inferior tribunals.” Pierce Butler hotly exclaimed that the people would not bear such innovations; the States would revolt at such encroachments. Even supposing such establishments to be useful, we must not venture on them. The example of Solon should be followed, who gave the Athenians not the best

government he could devise, but the best they would receive. Then for the first time Rufus King threw himself into the debate. He scorned the idea of expense, and supported the views of Madison, Wilson and Dickinson. A great majority was then obtained for Dickinson's motion.<sup>1</sup>

A strenuous effort was then made by Wilson to associate the Judiciary with the Executive in a negative on the acts of the Legislature. Without some such provision, he argued, the latter could at any moment sink the Executive into non-existence. Madison adopted this view. The Executive would stand in need of being controlled as well as supported. An association of the judges in his revisionary function would both double the advantage and diminish the danger. It would also enable the judiciary the better to defend itself against legislative encroachments; the utility of annexing the wisdom and weight of the Judiciary to the Executive seemed incontestable. Gerry and Charles Cotesworth Pinckney earnestly opposed a plan by which the Executive "would be covered by the sanction and seduced by the sophistry of the Judges." It would destroy the independence of the judiciary, which ought to be separate and distinct from the other great departments. The motion was lost by a vote of eight States to three, Connecticut, New York and Virginia sustaining the affirmative.<sup>2</sup>

It was unanimously agreed "that the jurisdiction of the national judiciary shall extend to cases which respect the collection of the national revenue, impeachments of all national officers, and questions which involve the national peace and harmony."<sup>3</sup>

<sup>1</sup> Elliott's Debates, Vol. V, pp. 155-160.

<sup>2</sup> *Ibid.* pp. 151, 155, 164, 165-166

<sup>3</sup> *Ibid.* p. 188.

In this shape the matter was reported by Mr. Gorham as Chairman of the Committee of the Whole, with the additional resolution that the national judiciary consist of one supreme tribunal, the judges of which should be appointed by the second branch of the national legislature, to hold their offices during good behavior, and to receive punctually, at stated times, a fixed compensation for their services, in which no increase or diminution shall be made so as to affect incumbents. At this stage Alexander Hamilton came forward, and after a speech of great power, in which he struck a high key in support of national supremacy, read a sketch, the seventh section of which was in these words:

“The supreme judicial authority to be vested in judges, to hold their offices during good behavior, with adequate and permanent salaries. This Court to have original jurisdiction in all causes of capture, and an appellate jurisdiction in all causes in which the revenues of the General Government or the citizens of foreign nations are concerned.”<sup>1</sup>

The debate was resumed at a later day upon all the essential features involved. Gorham, Sherman and Gouverneur Morris favored the appointment of the judges by the executive with the advice and consent of the second branch, a mode ratified by the experience of several of the States for one hundred and forty years, which was finally agreed to. Morris contended that the legislature ought to be at liberty to increase salaries as circumstances might require. Madison thought that this would be highly improper. Whenever an increase was wished by the judges, or the matter was agitated in the legislature, an undue complaisance in the former would be felt toward the latter. If at such a crisis there should be in Court suits to which

<sup>1</sup> Elliott's Debates, Vol. V, p. 205.

leading members of the legislature might be parties, the judges would be in a situation which ought not to be suffered if it could be prevented. The words "no increase" were then stricken out. The tenure of good behavior was unanimously assented to. Once more the debate raged upon the question of inferior tribunals. Once more Pierce Butler exclaimed that he could see no necessity for such tribunals; surely the State Courts might do the business. Luther Martin declared that they would create jealousies and opposition in the State tribunals and lead to many conflicts of jurisdiction. Gorham reminded the Convention that a Federal Court already existed in the States with jurisdiction for the trial of captures, piracies, &c., on the seas. No complaints had ever been made by the States, or by the courts of the States. Inferior tribunals were essential to render the authority of the national legislature effectual. Randolph observed that the courts of the States could not be trusted with the administration of the national laws. The very objects of jurisdiction would often place the general and local policy at variance. Sherman and George Mason urged that such a power might become absolutely necessary. A vote was then taken, and the resolution empowering the national legislature to appoint inferior tribunals was agreed to. The trial of impeachments of national officers was taken from the Federal Courts, and then on the motion of Madison the Federal jurisdiction was unanimously made to "extend to all cases arising under the national laws, or involving the national peace and harmony."<sup>1</sup>

Wilson now renewed his motion "that the Supreme national Judiciary should be associated with the Executive in the revisionary power." Though the proposition had once been

<sup>1</sup>Elliott's Debates, Vol. V, pp. 331, 332.

defeated, he was so confirmed, by reflection, in the opinion of its utility, that he thought it incumbent upon him to make another effort. The judiciary ought to have an opportunity of remonstrating against projected encroachments on the people as well as on themselves. Although the judges as expositors of the laws would have an opportunity of defending their constitutional rights, yet the power did not go far enough. Laws might be unjust, unwise, dangerous, destructive, and yet not be so unconstitutional as to justify the judges in refusing to give them effect. Let them share in the revisionary power and they would have an opportunity of taking notice of those features of a law, and of counteracting by the weight of their opinion the improper views of the legislature. The motion was seconded by Madison.

An interesting debate followed, in which great ability was displayed. Gorham did not see the advantage of employing the judges in this way. As judges they are not to be presumed to possess any peculiar knowledge of the mere policy of public measures, nor could it be necessary as a security for their constitutional rights. The judges of England had no such protection, and yet their jurisdiction is not invaded. Far better would it be to let the Executive alone be responsible, and, at most, authorize him to call upon the Judges for their opinions. Ellsworth heartily approved of the motion. The aid of the Judiciary would give wisdom and firmness to the Executive. A systematic and accurate knowledge of the laws was necessary, which the Executive could not be expected always to possess. The law of nations, also, would frequently come into question. Of this the judges alone would have competent information. Madison considered the object of the motion as of the utmost importance to the meditated Constitution. It would be useful to the Judiciary as a defence

against Legislative encroachments; it would be useful to the Executive by inspiring confidence and firmness; it would be useful to the Legislature by preserving a consistency, conciseness, perspicuity and technical propriety in the laws—qualities shamefully wanting in our republican codes. It would be useful to the community at large, as an additional check against a pursuit of those unwise and unjust measures which constituted so great a portion of our calamities. It would not give too much strength to either the Executive or the Judiciary. The evil most to be apprehended was that, notwithstanding this co-operation of the two departments, the Legislature would still be an overmatch for them. All experience had evinced a powerful tendency in the legislature to absorb all power into its vortex. George Mason said he had always been a friend to this provision. It would give a confidence to the Executive which he would not otherwise have, and without which the revisionary power would be of little avail. Gerry had not expected to see this point, which had undergone full discussion, again revived. The object was to secure to the Executive, by the revisionary power, protection against the Legislature. The Executive, who will best know and be ready to defend his rights, ought alone to have the defence of them. There were strong objections to the motion. It was combining and mixing together the legislative and the other departments. It was establishing an improper coalition between the executive and judiciary departments. It was making statesmen of judges, and setting them up as the guardians of the rights of the people. The representatives of the people could be trusted. It was making legislators of the expositors of the laws, which ought never to be done. A better expedient would be to employ competent persons to draw bills for the legislature. Caleb Strong was of the same

opinion. It was a well-established maxim that the power of making ought to be kept distinct from that of expounding the laws. The Judges, in exercising the function of expositors, might be influenced by the part they had taken as legislators. Gouverneur Morris declared that the judges of England had a great share in legislation. They were consulted in difficult and doubtful cases. They might be, and some of them were, members of the legislature or of the privy council. The British Executive was strong in his prerogatives, but with us the interest of our Executive would be so inconsiderable and transitory, that he would require all the support he could obtain in resisting legislative encroachments. Luther Martin considered the association of the Judges with the Executive as a dangerous innovation, from which no advantage could be derived. A knowledge of mankind and of legislative affairs could not be presumed to belong in a higher degree to the Judges than to the Legislature. As to the constitutionality of laws that point would come before the Judges in their official character. Thus they have a most effective negative on the laws. Join them with the Executive in the revision and they would have a double negative. The Judiciary would lose the confidence of the people if they were employed in the task of remonstrating against popular measures of the legislature. Besides, in what mode and proportion were they to vote in the Council of Revision?

Madison, Mason, Wilson and Morris again took the floor to answer the objections which had been urged. Gerry and Gorham replied, the former urging that the Executive and the Judiciary would enter into an offensive and defensive alliance against the Legislature; the latter, that as the Judges would outnumber the Executive, the revisionary check would be thrown entirely out of the Executive hands, and instead of



enabling him to defend himself, would enable the Judges to sacrifice him. John Rutledge closed the debate with the sententious declaration that the Judges of all men were most unfit to be concerned in the revisionary Council. They ought never to give an opinion on a law until it came before them for judicial determination. Besides, it was unnecessary. The Executive could consult his cabinet, and avail himself of their information and opinions. The vote was then taken, and the motion was lost; three States voting in the affirmative, four in the negative, two dividing, and one being absent.<sup>1</sup>

The various clauses as voted on were then referred to the Committee of Detail, consisting of Messrs. Rutledge, Randolph, Gorham, Ellsworth and Wilson, by whose able and experienced hands the precious and perdurable material furnished by the joint wisdom of the Convention was gradually fashioned into the bold features and majestic form of the Constitution, which finally received its most expressive lineaments from the skillful touches of Gouverneur Morris, whose genius as a literary and political artist rivalled that of Benvenuto Cellini as a sculptor.

The report of the Committee was received on the 6th of August, three months after the assembling of the Convention. The power of appointing the Judges of the Supreme Court was vested in the Senate alone. Whenever a dispute or controversy arose between two or more States respecting jurisdiction on territory and the matter was presented by memorial to the Senate, the contending States were to be notified to appear by their agents before the Senate upon a day properly assigned. By joint consent of the agents, judges or commis-

<sup>1</sup> Elliott's Debates, Vol. V. pp. 344-349.

sioners were to be appointed to constitute a court for the determination of the matter. In the event of disagreement the Senate was to name three persons from each State, and from this list each party was to alternately strike one until the number was reduced to thirteen, and from that number not less than seven nor more than nine names were to be drawn by lot, any five of whom should be commissioned as the judges to finally hear the controversy. If either party neglected to appear, without sufficient cause, or refused to strike, the Senate was to proceed to nominate three persons from each State, and the Clerk of the Senate was to strike in behalf of the absent or refusing party. If any of the parties refused to submit to the authority of such court, or did not appear to prosecute or defend, the Court was nevertheless to proceed to judgment, which was to be final and conclusive.<sup>1</sup>

Controversies respecting land claims under different grants of two or more States were to be determined in the same manner.<sup>2</sup> These provisions were taken, almost word for word, from the Ninth Article of Confederation. The main features of the report in relation to a national judiciary were as follows:

The Judicial power of the United States was to be vested in one Supreme Court, and in such inferior courts as should, when necessary, from time to time, be constituted by the legislature. The tenure was good behavior, the compensation was not to be diminished during continuance in office. The jurisdiction of the Supreme Court was to extend to all cases arising under laws passed by the legislature of the United States; to all cases affecting ambassadors, other public ministers and consuls; to the trial of impeachments of officers of

<sup>1</sup> Elliott's Debates, Vol. V, pp. 379-380.

<sup>2</sup> *Ibid.*

the United States; to all cases of admiralty and maritime jurisdiction; to controversies between two or more States (except such as should regard territory or jurisdiction); between a State and citizens of another State; between citizens of different States; and between a State, or the citizens thereof, and foreign States, citizens or subjects. In cases of impeachments, cases affecting ambassadors, other public ministers and consuls, and those in which a State should be a party, this jurisdiction was to be original. In all the other cases before mentioned it was to be appellate, with such exceptions, and under such regulations as the legislature should make. The legislature might assign any part of the jurisdiction above mentioned (except the trial of the President of the United States) in the manner and under the limitations which it should think proper, to such inferior courts as it should constitute from time to time. The trial of all criminal offences (except in cases of impeachment) was to be in the State where they were committed, and was to be by jury. Judgment, in cases of impeachment, was not to extend further than removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States. But the party convicted was to be liable to indictment, trial, judgment and punishment, according to law. The President was liable to removal from his office on impeachment by the House of Representatives and conviction in the Supreme Court, of treason, bribery or corruption. Although he had no share in the appointment of the Judges of the Supreme Court, who might be called upon to try him, he had the power to appoint the judges of the inferior courts, without the concurrence of the Senate or House.<sup>1</sup>

<sup>1</sup> See "Report of the Committee of Detail," Elliott's Debates, Vol. V, pp. 377-381.

The report was silent upon the question of associating the Judges with the Executive in a revisionary negative upon the acts of the Legislature; and although Madison, supported by Wilson, made a third effort to secure it, it was disposed of by a remark of Dickinson, that "the Justiciary of Aragon became by degrees the lawgiver." A proposition of Charles Pinckney that "Each branch of the Legislature, as well as the Supreme Executive, shall have authority to require the opinions of the Supreme Judicial Court upon important questions of law and upon solemn occasions," which was referred to the Committee, was smothered.

The first assault upon the Report of the Committee, as presented, was made by its Chairman, John Rutledge, who moved to strike out the provisions for deciding controversies between the States, or claimants of land under grants from different States, which he declared, though necessary under the Confederation, were rendered useless by the establishment of a national judiciary. William Samuel Johnson, Roger Sherman and Jonathan Dayton concurred. Williamson and Gorham thought that the provision might be good in cases where the judiciary were interested, or too closely connected with the parties. Wilson urged the striking out, which was done by a vote of eight States in the affirmative, two in the negative, with one absent.

Johnson then suggested that the judicial power ought to extend to equity as well as law, and moved to insert the words "both in law and equity," so that the clause should read "The judicial power of the United States both in law and equity, shall be vested in one Supreme Court," etc. Read objected to vesting these powers in the same court; they ought to be kept separate. The motion prevailed.

John Dickinson then made an effort to secure a provision

that the judges might be removed by the Executive on the application of the Senate and House of Representatives. He was supported by Gerry. Gouverneur Morris thought it a contradiction in terms to say that the Judges should hold their offices during good behavior, and yet be removable without a trial. Besides, it was fundamentally wrong to subject judges to so arbitrary an authority. Sherman saw no contradiction or impropriety if this were made a part of the constitutional regulation of the Judiciary department. A like provision was contained in the British statutes. Rutledge replied that if the Supreme Court is to judge between the United States and particular States, this alone was an insuperable objection to the motion. Wilson considered such a provision in the British government as less dangerous than here, the House of Lords and House of Commons being less likely to concur on the same occasions. Chief-Justice Holt had successively offended, by his independent conduct, both Houses of Parliament. Had this happened at the same time, he would have been ousted. The Judges would be in a bad situation if made to depend on any gust of faction which might prevail in the two branches of our government. Randolph opposed the motion as weakening too much the independence of the Judges. Dickinson did not fear the union of two Houses, constructed on different principles, for the purpose of displacing a judge, unless he were guilty of improper conduct. His motion was lost, Connecticut alone voting in the affirmative.<sup>1</sup>

Johnson then moved that the judicial power 'should extend "to all cases arising under the Constitution," and the motion was unanimously agreed to, it being generally supposed that

<sup>1</sup> Elliott's Debates, Vol. V, p. 481.

the jurisdiction given was constructively limited to cases of a judiciary nature, notwithstanding an expression of Madison that the right of expounding the Constitution in cases not of this nature ought not to be given to that department.<sup>1</sup>

In this way, as Mr. Bancroft has pointed out, Madison's scheme of restraining unconstitutional legislation of the States by securing to the legislature of the Union a veto on every act of State legislation was finally abandoned, and the power of revising and reversing a clause of a State law that conflicted with the Federal Constitution was confided exclusively to the Federal judiciary, but only when a case should be properly brought before the Court.<sup>2</sup>

Rutledge next added that the jurisdiction should extend to treaties made, or to be made, under the authority of the United States; and the proposal was adopted.

The clause, "in cases of impeachment," was postponed, and that duty was subsequently assigned to the Senate.<sup>3</sup>

The method of choosing all the Federal judges was then settled without further debate, and the power of appointment, without discriminating between the Supreme Court and inferior tribunals, was bestowed upon the Executive, to be exercised with the advice and consent of the Senate. Finally, upon the proposition of Luther Martin, it was declared: "This Constitution and the Laws of the United States made and which shall be made in pursuance thereof, and all Treaties made or which shall be made under the authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any-

<sup>1</sup> Elliott's Debates, Vol. V, p. 483.

<sup>2</sup> George Bancroft's "History of the Formation of the Constitution of the United States of America," Vol. II, p. 198.

<sup>3</sup> Elliott's Debates, Vol. V, p. 483.

thing in the Constitution or Laws of any State to the contrary notwithstanding,"<sup>1</sup> a declaration which has been termed "the Bill of Rights of the National Judiciary."<sup>2</sup>

The Article relating to the Judiciary was now complete. The metal had been forged and beaten into shape beneath the repeated blows of vigorous and well-trained minds, and was now delivered to be polished to the Committee on Style, consisting of Johnson, Hamilton, Gouverneur Morris, Madison and King, but the elegance of expression which characterized the final draft is due to the pen of Morris.

On the 17th of September, 1787, the Convention completed its work, and committed to the people of the United States, for their approval, that great Charter of Government now known and honored everywhere as the Constitution of the United States. The act of signing was performed in that doubly sanctified chamber of the old State House, in Philadelphia, in which the immortal Congress of July, 1776, had assembled. But three of the members present refused to add their names to "that consecrated roll." The others followed the example of Franklin and consented to the Constitution because they expected nothing better, and because they were not sure that it was not the best that could be had. The opinions they had of its errors they sacrificed to the public good. In all their deliberations they had kept steadily in view that which appeared to them the greatest interest of every true American, the consolidation of the Union, in which was involved their prosperity, felicity, safety and National existence. This important consideration, seriously and deeply impressed on the minds of the members, led each State in the Convention to be less

<sup>1</sup> Constitution of the United States, Article VI.

<sup>2</sup> William Allen Butler, Esq.

rigid in points of inferior magnitude than might have been otherwise expected. And thus the Constitution as presented was the result of amity and of that mutual deference and concession which the peculiarity of the political situation rendered indispensable.<sup>1</sup>

The God of wisdom illuminated the deliberations of that hour. The labors of that day preserved for all time the precious fruits of freedom and self-government. Unique in origin; without a prototype in design; of enduring strength and of phenomenal success, in the history of political philosophy the Constitution will always stand alone. And not the least of the wonders wrought by the statesmanship of America was the establishment of a National Judiciary, with a jurisdiction co-extensive with the limits of the legislative power, and no longer destitute of the energies which such a department ought to possess.

<sup>1</sup> See "Letters accompanying the Constitution and addressed to the Congress by the Convention." Elliott's Debates, Vol. V, p. 536.



## CHAPTER IX.

OBJECTIONS URGED BY THE STATES: ANSWERS THERETO: VIEWS OF THE STATE  
JUDICIARIES UPON THE POWER OF THE COURTS TO ANNUL AN ACT OF THE  
LEGISLATURE: SCOPE AND PURPOSE OF ARTICLE THIRD IN THE CONSTITUTION.

IT was not to be expected that the proposed instrument would meet with the full and entire approbation of every State, and it is an interesting subject of study to mark the various objections which were urged against the Article relating to the Judiciary, and the answers which were made by the publicists and essayists of that time.

An intense struggle took place, the most violent passions were fully aroused, and fears and prejudices were madly appealed to when arguments failed of which logic or sober reason could approve. Many of the most famous names in our history were vehement in their opposition, while many others were either neutral, or gave to the Constitution but a lukewarm support. The common fear, and the usual prediction—that the General Government would subvert the State governments, with a loss of personal freedom—appear in almost all the “Observations,” “Examinations,” “Addresses,” “Letters,” “Remarks” and “Objections,” which were put forth as anti-federal arguments.

Elbridge Gerry, in stating the reasons which determined him in withholding his signature from the completed Constitution, declared that the rights of citizens were rendered insecure by the general power of the legislature “to establish a tribunal without juries, which will be a Star Chamber as to

civil cases.”<sup>1</sup> In his letter to the President of the Massachusetts Senate, he expressed a fear “that the judicial department will be oppressive,”<sup>2</sup> and in a pamphlet, published under the title of “Observations on the New Constitution and on the Federal and State Conventions, by a Columbian Patriot,”<sup>3</sup> he declared:

“There are no well-defined limits of the Judiciary Powers; they seem to be left as a boundless ocean that has broken over the chart of the Supreme Lawgiver, ‘*Thus far thou shalt go and no further,*’ and as they cannot be comprehended by the clearest capacity or the most sagacious mind, it would be an Herculean labor to attempt to describe the dangers with which they are replete.”<sup>4</sup>

Edmund Randolph, who also refused to affix his name to the Constitution, in a letter to the Speaker of the House of Delegates, objected that there was no limitation or definition of the judicial power.<sup>5</sup> George Mason, the remaining member of the Federal Convention who refused to sign, was more specific and less rhetorical than Gerry:

“The judiciary of the United States,” said he, “is so constructed and extended, as to absorb and destroy the judiciaries of the several States; thereby rendering law as tedious, intricate and expensive, and justice as unattainable by a great part of the community as in England; and enabling the rich to oppress and ruin the poor.”<sup>6</sup>

<sup>1</sup> Elliott's Debates, Vol. V, p. 553.

<sup>2</sup> “Letter containing the Reasons of the Hon. Elbridge Gerry for not signing the Federal Constitution.” Elliott's Debates, Vol. I, p. 493.

<sup>3</sup> Reprint in “Pamphlets on the Constitution of the United States, published during its discussion by the People, 1787-1788. Edited by Paul Leicester Ford.”

<sup>4</sup> Upon this Rufus King wrote to John Alsop: “E. G. has come out as a *Columbian Patriot*—a pitiful performance. The author sinks daily in public esteem, and his bantling goes unnoticed.”

<sup>5</sup> Randolph's Letter—Elliott's Debates, Vol. I, p. 491.

<sup>6</sup> Mason's Letter—*Ibid.* p. 495.

The most strenuous opposition was made by Richard Henry Lee, who, in "Letters of the Federal Farmer," stated and re-stated his lament that the jury trial of the vicinage had been effectually abolished. Under one General Government alone, he argued, there could be but one judiciary, one supreme and a proper number of inferior Courts. It would be totally impracticable in this case to preserve a due administration of justice, and the real benefits of the jury trial of the vicinage, because there are now Supreme Courts in each State, and a great number of county and other courts subordinate to each Supreme Court, most of which were itinerant and held their sessions every year in different parts of their respective States, counties and districts; notwithstanding this, citizens must travel considerable distances to find the place where justice is administered. Although he was not for bringing justice so near to each man's door as to tempt him to engage in lawsuits, yet he thought it one of the greatest benefits in a good government that each citizen should find a Court within a reasonable distance, perhaps, within a few days' travel of his home; so that without great inconvenience and enormous expense, he might have the advantages of his witnesses and jury. But it would be impracticable to derive these advantages from one judiciary—the one Supreme Court at most could only sit in the centre of the Union, and move once a year into the centre of the Eastern and Southern extremes of it, and, in this case, each citizen, on an average, would travel 150 or 200 miles to find this court; that, although inferior Courts might be properly placed in the different counties and districts of the Union, the appellate jurisdiction would be intolerable and expensive.

How little did he foresee the practice of the future; how little did he dream of the railroad, the steamboat and the tel-

egraph, the employment of resident counsel, or other agencies of our modern life.

Another objection that he urged, was that powers ever kept distinct in well balanced governments were improperly blended in the hands of the same men—"in the judges of the Supreme Court is lodged the law, the equity, and the fact."

As the judicial powers of the Federal courts were extended to all cases in law and equity, therefore the powers to determine on the law, in equity, and as to the fact, would all concentrate in the Supreme Court. The Constitution blended all these in the same hands—the same judges. The wisdom of Great Britain had deposited them in different hands—the Common Law jurisdiction was distinct from that of the Chancellor, and the trial by jury was beyond the reach of the powers of both. It was dangerous indeed to vest in the same judges power to decide on the law, and also give them general powers in equity; for if the law restrain them, they need only step into their shoes of equity and give what judgment their reason or opinions may dictate. In short, he asserted that in the Supreme Court as established by the Constitution he saw not a spark of freedom or a shadow of our own or the British Common Law.

How little did he foresee the fusion of law and equity, the adaptation of common law forms to equitable principles, or the skill with which the same judge could apply without confusion the maxims of both.

Again, he urged as an objection, that the judicial powers respect internal as well as external objects. Powers to lay and collect internal taxes, to make bankrupt laws, and to decide, on appeal, questions arising on the internal laws of the respective States, were of a serious nature, and, taken in connection with others proposed to be lodged in the central Gov-

ernment, comprehended all the essential powers of the community, and left nothing of importance to the States. He objected to the extension of the powers of the Federal judiciary to all cases between a State and the citizens of another State, between citizens of different States, between a State or the citizens thereof and foreign States, citizens or subjects. Actions in all these cases, except against a State government, were then brought and finally determined in the law courts of the States respectively, and as there were no words to exclude these Courts of their jurisdiction in these cases, they would have concurrent jurisdiction with the inferior Federal courts in them. There was no need of opening a new jurisdiction in these causes, a new scene of expensive lawsuits, of suffering foreigners and citizens of different States dragging each other many hundred miles into the Federal Courts. An appeal will lie in all these cases from the State Courts or Federal inferior courts to the Supreme Judicial Court of the Union, and a wild conflict of jurisdiction will ensue.

Little did he foresee the ease and convenience of the system he denounced, and how little fraught with danger was the doctrine of concurrent jurisdiction.

Once more did he object that trial by jury was secured only in those few criminal cases to which the Federal laws would extend, as crimes committed on the high seas, against the law of nations, treason, and counterfeiting the Federal securities and coin; but even in these cases the jury trial of the vicinage was not secured, particularly in the large States; a citizen might be tried for a crime five hundred miles from the place where it was committed. In civil cases trial by jury was not secured at all. It was an important question whether jury trial was not excluded from the Supreme Court. In all cases affecting ambassadors, other public ministers and

consuls, and in those cases in which a State shall be a party, the Supreme Court was to have original jurisdiction. In all the other cases mentioned, the Supreme Court was to have appellate jurisdiction both as to *law and fact*, with such exceptions and under such regulations, it was true, as Congress might make. But by the word "Court" is understood a court consisting of judges, and the idea of a jury was excluded. As the Court or the judges were to have jurisdiction on appeals, in all enumerated cases, as to law and fact, it followed that the judges were to decide the law and try the fact, and the trial of the fact being assigned to the judges by the Constitution, a jury for trying the fact was excluded. He saw a gleam of hope, however, in the power of Congress to declare exceptions and make regulations.<sup>1</sup> He did foresee, however, and pointed his warning finger to the shadow cast by the coming decision of *Chisholm's Executors v. The State of Georgia*:<sup>2</sup>

"How far it may be proper to admit a foreigner," he wrote, "or the citizens of another State to bring actions against State governments, which have failed in performing so many promises made during the war, is doubtful: How far it may be proper so to humble a State as to oblige it to answer to an individual in a Court of law, is worthy of consideration; the States are now subject to no such actions; and this new jurisdiction will subject the States and many defendants to actions and processes which were not in contemplation of the parties when the contract was made; all engagements existing between citizens of different States, citizens and foreigners, States and foreigners, and States and citizens of other States were made, the parties contemplating the remedies then existing in the laws of the States—and the new remedy proposed to be given in the Federal Courts can be founded on no principle whatever."

<sup>1</sup> R. H. Lee, "Letters of a Federal Farmer," in Paul Leicester Ford's "Pamphlets on the Constitution, published during its Discussion by the People," pp. 277-325.

<sup>2</sup> 2 Dallas, 419 (1793).

<sup>3</sup> Ford's Pamphlets, p. 309.

Substantially the same arguments were urged with tremendous force by Luther Martin, then Attorney-General of Maryland, in his notable Letter on the Federal Convention, in which, with remarkable clearness of statement, he dwelt upon the manner in which trial by jury had been destroyed, and a vast and varied jurisdiction snatched from the State Courts.<sup>1</sup>

Patrick Henry exclaimed:

"The purse is gone; the sword is gone; \* \* \* the independency of the judges is impaired; \* \* \* I see the prostration of all our rights. In what a situation will your judges be, when they are sworn to preserve the Constitution of the State and of the General Government? If there be a concurrent dispute between them, which will prevail? They cannot serve two masters struggling for the same object. The laws of Congress being paramount to those of the States, and to their Constitutions also, whenever they come in competition, the judges must decide in favor of the former. This, instead of relieving or aiding me, deprives me of my only comfort—the independency of the judges. The judiciary are the sole protection against a tyrannical execution of the laws. But if by this system we lose our judiciary, and they cannot help us, we must sit down quietly and be oppressed." <sup>2</sup>

In every State similar fears were expressed, and the same gloomy prophecies were made. The counter-statements were numerous and cogent. In Virginia the venerable Edmund Pendleton, the President of the State Convention, ripe in judicial experience, and a member of the highest State Court whose jurisdiction it was alleged had been invaded and impaired, replied to the impassioned invective of Patrick

<sup>1</sup> "The Genuine Information, delivered to the Legislature of the State of Maryland, relative to the Proceedings of the General Convention," Elliott's Debates, Vol. I, p. 344.

<sup>2</sup> Elliott's Debates, Vol. III, p. 539.

Henry in words which have the calmness of a judicial utterance :

“If there were any person in this audience who had not read the Constitution, or who had not heard what has been said, and should have been told that the trial by jury was intended to be taken away, he would be surprised to find, on examination, that there was no exclusion of it in civil cases, and that it was expressly provided for in criminal cases.”

Of those who objected that there was an unlimited power of appointing inferior Courts, he asked, whether it would have been proper to limit this power? “Could the framers of the instrument have extended their ideas to all the necessities of the United States, and seen every case in which it would be necessary to have an inferior tribunal?” By the regulations of Congress, they may be accommodated to public convenience and utility. It would have been folly to have fixed in the Constitution a number that could not have been increased or diminished save by an amendment. As to jurisdiction, assuming that a judiciary is necessary, the power of that judiciary must be co-extensive with the legislative power, and reach to all parts of society intended to be governed. There must be some Court which shall be the central point of operations; and because all the business cannot be done in that Court, there must be inferior Courts to carry it on. Turning to another topic, he said :

“The impossibility of calling a sovereign State before the jurisdiction of another sovereign State showed the propriety and necessity of vesting this tribunal with the decision of controversies to which a State shall be a party.”

As to the jurisdiction given in disputes between citizens of different States, he put this case :



“Suppose a bond given by a citizen of Rhode Island to one of our citizens. The regulations of that State being unfavorable to the claims of the other States, if he is obliged to go to Rhode Island to recover it, he will be compelled to accept payment of one third, or less, of his money. He cannot sue in the Supreme Court, but he may sue in the Federal inferior Court; and on judgment to be paid one for ten, he may get justice by appeal. Is it an eligible situation? Is it just that a man should run the risk of losing nine-tenths of his claim? Ought he not to be able to carry it to that Court where unworthy principles do not prevail?”

Paper money and tender laws, he asserted, may be passed in other States, in opposition to the Federal principle, and in restriction of this Constitution, and there will be need of jurisdiction in the Federal judiciary to stop their pernicious effects.<sup>1</sup>

In the same line of calm, but convincing argument, John Marshall, unconscious of the immortal future before him as the greatest of all judicial interpreters of the Constitution, declared:

“Here are tribunals appointed for the *decision of controversies* which were before either not at all, or improperly, provided for. \*\*\* Gentlemen have gone on the idea that the Federal Courts will not determine the causes which may come before them with the same fairness and impartiality with which other courts decide. What are the reasons for this supposition? Do they draw them from the manner in which the judges are chosen, or the tenure of their office? What is it that makes us trust our judges? Their independence in office and manner of appointment. Are not the judges of the Federal Court chosen with as much wisdom as the judges of the State governments? Are they not equally, if not more independent? If so, shall we not conclude that they will decide with equal impartiality and candor?”<sup>2</sup>

<sup>1</sup> Elliott's "Debates in the Virginia Convention," Vol. III, pp. 547-549.

<sup>2</sup> *Ibid.*, 551.

Pursuing the Socratic method of closely questioning those whom he would convince, he asks :

“Is it not necessary that the Federal Courts should have cognizance of cases arising under the Constitution and the laws of the United States? What is the service or purpose of a judiciary but to execute the laws in a peaceable, orderly manner, without shedding blood, or creating a contest, or availing yourselves of force? If this be the case, where can its jurisdiction be more necessary than here? To what quarter will you look for protection from an infringement of the Constitution if you will not give the power to the judiciary?”

Replying to the argument built on the narrow meaning of the word “court,” he said :

“The exclusion of trial by jury is urged as the prostration of our rights. Does the word *court* only mean the judges? Does not the determination of a jury necessarily lead to the judgment of a court? Is there anything here which gives the judges exclusive jurisdiction of matters of fact? What is the object of a jury trial? To inform the Court of the facts. When a Court has cognizance of the facts, does it not follow that they can make inquiry by a jury?”<sup>1</sup>

Madison argued that a Supreme Court was necessary to secure uniformity in the exposition of treaties. “The establishment of one revisionary superintending power can alone secure such uniformity.” The same principles, he held, applied with respect to cases affecting ambassadors and foreign ministers, and also admiralty and maritime cases. As our intercourse with foreign nations would be affected by decisions of this kind, they ought to be uniform. This could only be done by giving the Federal judiciary exclusive jurisdiction. Controversies affecting the interests of the United States ought to be deter-

<sup>1</sup> Elliott's Debates, Vol. III, pp. 551-563.

mined by their own judiciary and not be left to partial, local tribunals.<sup>1</sup>

Similar arguments were pressed by James Wilson in Pennsylvania, and Hamilton and Jay in New York. At the same time numerous pamphlets appeared from the pens of those who were not members of the Federal or the State Conventions. Of these the most remarkable were an "Examination into the Leading Principles of the Federal Constitution," by Noah Webster, afterwards known as the eminent lexicographer, an "Examination of the Constitution of the United States," by Tench Coxe, of Pennsylvania, "Remarks on the Proposed Plan of Federal Government," by Alexander Contee Hanson, of Maryland—an essay of close reasoning and marvellous eloquence of expression, and "Observations on George Mason's Objections to the Federal Constitution," by James Iredell, of North Carolina, who owed his subsequent appointment as an Associate Justice of the Supreme Court of the United States to the ability displayed in this very paper which attracted the attention of Washington.<sup>2</sup>

The insinuation that trials by jury are to be abolished, Webster denounced as groundless and beyond conception wicked. It was the circulation of a barefaced falsehood respecting a privilege dear to freemen, and could only proceed from a depraved heart and the worst intentions. The prediction as a probable event that the Federal courts would absorb the judiciaries of the States, he declared to be a mere suspicion, without the least foundation, and he dismissed as trifling all objections based on declarations that the jurisdiction of

<sup>1</sup> Elliott's Debates, Vol. III, p. 532.

<sup>2</sup> All these papers are reprinted by Paul Leicester Ford, in his "Pamphlets on the Constitution of the United States, Published during its discussion by the People, 1787, 1788."

the Federal courts was not accurately defined or easily understood.

Tench Coxe, who had been a member of the Continental Congress and the Annapolis Convention, quieted the fears of those who had been disturbed by the loud outcry that almost every kind of suit would be brought in the Federal courts to the utter subversion of the local tribunals, by pointing out that trials for lands lying in any State between persons residing in such State, for bonds, notes, book debts, contracts, trespasses, assumptions, and all other matters between two or more citizens of the same State would be held in the State Court by juries, and the Federal courts could not interfere in any manner, except where questions were involved concerning State laws which infringed the Constitution. He also pointed out that where the trial was to be had between citizens of different States, the plaintiff would not be obliged to go into a Court constituted by the State, with which, or with the citizens of which, his dispute was, but could appeal to a perfectly disinterested tribunal, from which trial by jury was not excluded.

Alexander Contee Hanson, the future Chancellor of Maryland, scouted the anti-federal arguments:

“As the rod of Aaron once swallowed up the rods of the Egyptian *magi*, so also is it feared that these Federal Courts will, at length, swallow up the State tribunals. A miracle, in one case, is as necessary as in the other. But let not the officers of State Courts be overmuch alarmed!”

James Iredell, then a fast rising lawyer of thirty-five years of age, addressed himself to the objection made by Mason, and pertinently asked:

“Are not the State judiciaries left uncontrolled as to the affairs of

that State only? In this, as in all other cases where there is a wise distribution, power is commensurate to its object. In no case but where the Union is in some measure concerned are the Federal Courts to have any jurisdiction. The State judiciary will be a satellite waiting upon its proper planet; that of the Union, like the sun, cherishing and preserving a whole planetary system."

In seven successive numbers of "The Federalist," Hamilton examined the constitution of the judicial department, in relation to the tenure of good behavior, the provisions for the support and responsibility of the judges, the extent of their powers and jurisdiction, the distribution of their authority, trial by jury and some miscellaneous questions. On all these he wrote as one having authority. He had sat in the Convention, had taken part in the debates, had listened to the objections lodged against every article, and had a memory stored with the precise information which the task required.

The most brilliant of recent historians has observed that "it is not easy for us to form a notion of the effect these papers had on the men who, for the first time, saw them in the Packets and Gazettes," and adds that "there is no reason whatever to suppose that the followers of Clinton gave any more heed to the writings of Publius than did the followers of Hamilton to the foolery of Brutus and the nonsense of Centinel."<sup>1</sup> Whether this sentiment be just, or whether it depreciate the effect produced by the marvelous ability of the authors of "The Federalist," whose work has been seriously and reverently called the Bible of Republicanism, the fact remains that for comprehensiveness of design, strength, clearness and simplicity, the book has no parallel among the writings of men, not even excepting or overlooking those of

<sup>1</sup> McMaster's "History of the People of the United States," Vol. I, p. 484.

Montesquieu and Aristotle. The result was happy, and the triumph of the Constitution was complete.

As a part of the judicial history of the period, and as a forerunner of the doctrine of the Supreme Court of the United States in *Marbury v. Madison*, decided in 1803,<sup>1</sup> it is of interest to trace the growth of the principle that a Court can declare an act of the Legislature void because of its repugnance to the Constitution of a State. Various claims have been made to the distinction of priority. Rhode Island claims it, and recently it has been asserted that the honor belongs to an argument of Iredell made in a North Carolina case, argued before, but not decided until after, the Rhode Island case of *Trevett v. Weeden*, in 1786, while an admirer of Chief-Justice Brearley, of New Jersey, endeavors to show that the laurels belong to him.<sup>2</sup> The truth is, that the palm must be awarded to Virginia.

In November, 1782, the case of *Commonwealth v. Caton et al.* came before the Court of Appeals of that State.<sup>3</sup> John Caton and others had been condemned for treason by the General Court under an Act of 1776, defining the offence, which took from the Executive the power to pardon. The House of Delegates, by resolution of the 18th June, 1782, granted them a pardon; but the Senate refused to concur.

<sup>1</sup> 1 Cranch, 158.

<sup>2</sup> See Arnold's "History of Rhode Island," Vol. II, Ch. 24, *Trevett v. Weeden*; Cooley's "Constitutional Limitations," 6th Edit., pp. 193-194, note; Hannis Taylor, "The Origin and Growth of the English Constitution," p. 47; *Bayard v. Singleton*, 1 Martin (N. C.) 42 (1787); Hon. A. M. Waddell's Article on "Judge James Iredell," in the "News and Observer," Aug. 11, 1890; Hon. Austin Scott, "Address before the Historical Society of New Brunswick, N. J., on the Federal Convention." See also a learned and admirable paper entitled, "Relation of the Judiciary to the Constitution," by Wm. M. Meigs, Esq., of Philadelphia, *The American Law Review*, XIX, 175 (1885).

<sup>3</sup> 4 Call (Va.) 5-21.

When the Attorney-General moved that execution of the judgment be awarded, the pardon was pleaded, and the General Court adjourned the case to the Court of Appeals, where the pardon was held to be invalid. Although there was not a direct conflict between the so-called law and the Constitution, and therefore the remarks of the judges are to be regarded as *obiter dicta*, yet the expressions they used are the first to be found relating to the subject. Judge Wythe earnestly and unequivocally asserted the controlling power of the judiciary. After adverting to the particular circumstances of the case, and declaring that, whenever the proper occasion should occur, he would feel it to be his duty to protect one branch of the Legislature against the usurpations of the other, he concluded by saying :

“Nay, more, if the whole legislature—an event to be deprecated—should attempt to overleap the boundaries prescribed to them by the people, I, in administering the justice of the country, will meet the united powers at my seat in this tribunal, and pointing to the Constitution, will say to them, Here is the limit of your authority ; hither shall you go, but no further.”

The President of the Court, Mr. Pendleton, expressed no opinion, but contented himself with remarking :

“But how far this Court in whom the judiciary powers may, in some sort, be said to be concentrated, shall have power to declare the nullity of a law passed in its forms by the legislative power, without exercising the power of that branch contrary to the plain terms of the Constitution, is indeed a deep, important, and, I will add, tremendous question, the decision of which might involve consequences to which gentlemen may not have extended their ideas.”

Chancellor Blair and the rest of the judges, so says the reporter, were of opinion that the Court had the power to de-

clare any resolution or act of the legislature void if in conflict with the Constitution.<sup>1</sup>

The next case in point of date was that of *Holmes v. Walton and others*, arising under the seizure laws. The State of New Jersey had passed an act providing for trials by juries consisting of six men. This law was held by Chief Justice Brearley to be unconstitutional. The date of this decision is uncertain, but that it was prior to 1785 is fixed by a reference of Gouverneur Morris, who, in an "Address to the Assembly of Pennsylvania against the abolition of the Charter of the Bank of North America," made in that year, used this language:

"The boasted omnipotence of legislative authority is but a jingle of words. In the literal meaning, it is impious. And whatever interpretation lawyers may give, freemen must feel it to be absurd and unconstitutional. Absurd, because laws cannot alter the nature of things; unconstitutional, because the Constitution is no more if it can be changed by the legislature. A law was once passed in New Jersey which the judges pronounced to be unconstitutional, and therefore void. Such power in judges is dangerous; but unless it somewhere exists the time employed in framing a Bill of Rights and Form of Government was merely thrown away."

<sup>1</sup>See also Rives' "Life of Madison," Vol. II, pp. 262 *et seq.*

<sup>2</sup>Jared Sparks' "Life of Gouverneur Morris," Vol. III, p. 438. There is also a reference to this decision of Brearley in somewhat indistinct terms in the opinion of Kirkpatrick, C. J., in *State v. Parkhurst*, Appendix to 4 Halstead, p. 444.

For these references I am indebted to Hon. Austin Scott, of New Brunswick, N. J. Professor Rogers, of the Law School of the University of Michigan, states that Brearley announced as the opinion of himself and his associates, that the judiciary had the right to pronounce on the constitutionality of laws, in a case before the Court at a session at Hillsborough, in September, 1780. He does not state his authority. Introduction to "Constitutional History of the United States as seen in the Development of American Law," p. 10. Professor McMaster refers to the New York case of *Rutgers v. Waddington*, argued by Hamilton in the Mayor's Court of New York in 1784, but as the decision turned upon general principles, and not upon



The case of *Trevett v. Weeden* came before the Supreme Court of Rhode Island in 1786. An Act of Assembly imposed a heavy penalty on any one who should refuse to receive on the same terms as specie the bills of a bank chartered by the State, or who in any way should discourage their circulation. The penalty was made collectable on summary conviction without jury trial. The Court held the act void on the ground that jury trial was expressly given by the Colonial Charter, which then constituted the Constitution of the State. The Judges were punished by a refusal of the legislature to re-elect them at the end of the year, and were supplanted by more pliant tools by whose assistance the paper money was forced into circulation, and public and private debts extinguished by means of it.<sup>1</sup>

The case of *Bayard v. Singleton* came before the Supreme Court of North Carolina in November, 1787. An Act had been passed in 1785 requiring the Court to dismiss on motion suits brought by persons whose property had been confiscated, upon a mere affidavit of the defendants that they were purchasers from the commissioners of confiscated property. The case was argued for the plaintiffs by Iredell, Johnston and W. R. Davie, and for the defendants by Arthur Moore, then the Attorney-General, and subsequently Iredell's successor on the Bench of the Supreme Court of the United States. The Court held the law void, as destructive of trial by jury, and

a definite conflict between the Act criticized and a fundamental written law, I have not thought it proper to include it in the text. See McMaster's Hist. People U. S., I, 219-220.

<sup>1</sup> Arnold's "History of Rhode Island," Vol. II, chap. 24, p. 525. Cooley's "Constitutional Limitations," 6th Ed., pp. 193-194, note. Judge Cooley states that this was the first case in which a legislative act was declared void by reason of repugnance to a State Constitution, and in this he is followed by Mr. Hannis Taylor, "The Origin and Growth of the English Constitution," p. 47. They are in error.

twenty-seven similar cases were swept from the docket.<sup>1</sup> The argument of Iredell was a powerful presentation of the question, worked out in an original way, and is one of the most characteristic of his productions. It appears in substance in an address to the public, published in August, 1787, and in a letter addressed to Spaight in the same month.<sup>2</sup> Spaight had complained of the decisions of the judges as a usurpation of authority; that the State, instead of being governed by the representatives in General Assembly, would be subject to the will of three individuals, who united in their own persons the legislative and judiciary powers, which no monarch in Europe enjoyed, and which would be more despotic than the Roman Decemvirate, and equally as insufferable. In reply Iredell confessed that it had ever been his opinion that an act inconsistent with the Constitution was void, and that the judges, consistently with their duties, could not carry it into effect. The Constitution was a fundamental law, limiting the powers of the legislature, and with it every exercise of these powers must, necessarily, be compared.<sup>3</sup>

There was no precedent in ancient or modern judicial history before the cases just reviewed were decided, which warranted a court in asserting such a principle, and as has been observed by a recent writer, it was difficult for men trained under the English system of jurisprudence, to conceive the idea that a mere Court should assume the prerogative of setting aside a law enacted by the legislature and approved by the Executive.<sup>4</sup>

<sup>1</sup> 1 Martin (N. C.) 42.

<sup>2</sup> McRee's "Life and Correspondence of James Iredell," Vol. II, pp. 145-168.

<sup>3</sup> In 1792 the Supreme Court of South Carolina held that an Act passed by the Colonial Legislature in 1712 was *ipso facto* void as being in contravention of Magna Charta. *Bowman v. Middleton*. 1. Bay p. 252.

<sup>4</sup> Prof. Rogers, *ut supra*.

Such is the history of the development of the principle, up to the time when the Federal Convention was held. John Francis Mercer, one of the Maryland delegates, expressed in strong terms his disapprobation of the doctrine that the judges, as expositors of the Constitution, had authority to declare a law void, and even such a man as John Dickinson, of Delaware, concurred with him, and said "No such power ought to exist," but the contrary view prevailed with the most able of the members of the Convention and passed without challenge, until Thomas Jefferson, in 1788, in "Observations upon the Constitution drafted for Virginia," while conceding the existence of the doctrine, declared his dislike of it, as it made the judiciary department paramount, in fact, to the legislature, "which was never intended and can never be proper." At the same time Hamilton was maintaining the opposite view in "The Federalist."<sup>1</sup>

In the same year the legislature of Virginia passed an act imposing on the judges of the Court of Appeals the duties of judges of the district courts, which was considered so clearly inconsistent with those provisions of the Constitution intended to secure the independence of the judiciary as to call forth a manifesto from the judges, in which the *quæstio vexata* of the legitimate province of the judicial power was met and firmly and explicitly resolved. The legislature yielded and repealed the act.

We have now traced the history of Article Third of the Constitution of the United States in the light of contemporaneous events, and viewed the successive stages of its composition. Its language is familiar to every lawyer and student of

<sup>1</sup> Compare Rives' "Life of Madison," Vol. II, p. 262, note, and "The Federalist," No. LXXVIII.

the Constitution. Its general scope and purpose are best stated by Chief Justice Jay, who wrote as follows:<sup>1</sup>

“It may be asked, what is the precise sense and latitude in which the words ‘to establish justice,’ as here used, are to be understood? The answer to this question will result from the provisions made in the Constitution on this head. They are specified in the Second Section of the Third Article, where it is ordained that the judicial power of the United States shall extend to ten descriptions of cases, viz. : 1st. To all cases arising under this Constitution; because the meaning, construction and operation of a compact ought always to be ascertained by all the parties, or by authority derived only from one of them. 2d. To all cases arising under the laws of the United States; because as such laws, constitutionally made, are obligatory on each State, the measure of obligation and obedience ought not to be decided and fixed by the party from whom they are due, but by a tribunal deriving authority from both the parties. 3d. To all cases arising under treaties made by their authority; because, as treaties are compacts made by, and obligatory on, the whole nation, their operation ought not to be affected or regulated by the local laws or Courts of a part of the nation. 4th. To all cases affecting Ambassadors or other public Ministers and Consuls; because, as these are officers of foreign nations, whom this nation is bound to protect and treat according to the law of nations, cases affecting them ought only to be cognizable by National authority. 5th. To all cases of Admiralty and Maritime jurisdiction; because, as the seas are the joint property of nations, whose rights and privileges relative thereto are regulated by the law of nations and treaties, such cases necessarily belong to National jurisdiction. 6th. To controversies to which the United States shall be a party; because, in cases in which the whole people are interested, it would not be equal or wise to let any one State decide and measure out the justice due to others. 7th. To controversies between two or more States; because domestic tranquillity requires that the contentions of States should be peaceably terminated by a common judicatory; and, because in a free country justice ought not to depend on the will of either of the litigants. 8th. To controversies between a State

<sup>1</sup>Chisholm's Exrs. *v.* The State of Georgia, 2 Dallas, 419 (1793).

and citizens of another State; because, in case a State (that is, all the citizens of it) has demands against some citizens of another State, it is better that she should prosecute their demands in a National Court than in a Court of the State to which those citizens belong; the danger of irritation and criminations arising from apprehensions and suspicions of partiality being thereby obviated. Because, in cases where some citizens of one State have demands against all the citizens of another State, the cause of liberty and the rights of men forbid that the latter should be the sole judges of the justice due to the latter; and true Republican Government requires that free and equal citizens should have free, fair and equal justice. 9th. To controversies between citizens of the same State claiming lands under grants of different States; because, as the rights of the two States to grant land are drawn into question, neither of the two States ought to decide the controversy. 10th. To controversies between a State, or the citizens thereof, and foreign States, citizens or subjects; because, as every nation is responsible for the conduct of its citizens towards other nations, all questions touching the justice due to foreign nations or people ought to be ascertained by and depend on national authority. Even this cursory view of the judicial powers of the United States leaves the mind strongly impressed with the importance of them to the preservation of the tranquillity, the equal sovereignty and the equal right of the people."

## CHAPTER X.

THE JUDICIARY ACT OF 1789 : DEBATE IN CONGRESS : FINAL PASSAGE OF THE ACT.

THE old Congress of the Confederation, among its last acts had provided that the First Congress under the Constitution should convene in the city of New York on the 4th of March, 1789. On that day but eight members of the Senate and thirteen of the House of Representatives appeared in their respective halls and took their seats, and both Houses adjourned from day to day until the 1st of April, when, a quorum of the House being present, an organization was effected by the choice of Frederick Augustus Muhlenberg, of Pennsylvania, as Speaker, and John Beckley as Clerk, both gentlemen being selected by ballot. It was not until the 6th of April, however, that a quorum of the Senate was present, so that this became the natal day of Congress.<sup>1</sup> On the following morning, while the House was entering into a discussion of duties on imports, the Senate preferred to grapple with the question of organizing the Judiciary, and appointed a Committee to bring in a Bill, of which Ellsworth was Chairman, with Paterson, Maclay, Strong, Lee, Bassett, Few and Wingate as associates.<sup>2</sup> On the 12th of June, Richard Henry Lee, in behalf of this Committee, reported a bill "to establish the Judicial Courts of the United States."

<sup>1</sup> "Annals of Congress," compiled by Joseph Gales, Sr., Vol. I, p. 16. "History of Congress," Vol. I, pp. 9-24.

<sup>2</sup> Annals of Congress, p. 18.

It is understood that the original draft, which was modified but little, was prepared chiefly by Ellsworth, with some assistance from Paterson.<sup>1</sup> It provoked considerable discussion and occupied the attention of the Senate for about seventeen days.

After "much wrangling about words" it was determined that there should be district courts. Lee, unable as a Senator of the United States, to divest himself of the views he had expressed in the "Letters of a Federal Farmer," then brought forward a motion,—which would have embarrassed the Constitutional provision had it prevailed,—that the jurisdiction of the Federal Courts should be confined to cases of admiralty and maritime jurisdiction. Grayson, his colleague, supported him, but was answered by Ellsworth, and the debate became warm. As the question was about to be put, William Maclay, of Pennsylvania, a member of the Committee, a sturdy democrat, and a close adherent to the language and letter of the Constitution, arose and observed that the effect of the motion was to exclude the Federal jurisdiction from each of the States, except in admiralty and maritime cases. But the Constitution expressly extended it to all cases, in law and equity, under the Constitution and laws of the United States; treaties made, or about to be made, &c. We already had existing treaties, and were about making many laws. These must be executed by the Federal judiciary. The arguments used were inapplicable, as no amendments of the Constitution were under consideration. Inasmuch as the powers of Con-

<sup>1</sup> Mr. Flanders in his *Life of Ellsworth*, "Lives and Times of the Chief Justices," Vol. II, p. 159, attributes a share of the honor to William Samuel Johnson, of Connecticut, but this is an error, as Dr. Johnson was not a member of the Committee. As the original bill is in the handwriting of Ellsworth preserved among the archives of the Government, it is very clear that though reported by Lee, the laurels belong to Ellsworth.

gress extended to the collection of taxes, duties, and imposts; the naturalization of foreigners, the coinage, punishing counterfeiting of the coin, treason against the United States, &c., and no force of construction could bring any of these cases within the admiralty or maritime jurisdiction, it was clear that all these cases were most expressly within the province of the Federal jurisdiction, so that the question resolved itself into the simple one, Shall we follow the Constitution or not? Lee sought to parry the effect of this direct reasoning by the singular argument that the State judges would all be sworn to support the Constitution; that they must obey their oaths, and of course execute the Federal laws. To this Maclay replied that exactly the contrary could be looked for; that the Judges would swear to support the Constitution, that the Constitution placed the judicial power of the Union in one Supreme Court and such inferior Courts as might be established; and, of course, the State judges, by virtue of their oaths, would abstain from every judicial act under the Federal laws, and would refer all such business to the Federal Courts; that if any matter made cognizable in a Federal Court should be agitated in a State Court, a plea to the jurisdiction would immediately be put in, and proceedings would be stayed.<sup>1</sup> Lee's motion was then put and rejected.

The number of Judges to be appointed to the Supreme Court was then discussed. Grayson favored six. Maclay thought that if the Circuit Courts were established, six were

<sup>1</sup> "Sketches of Debate in the First Senate of the United States in 1789-90-91 by William Maclay, a Senator from Pennsylvania," (Harrisburg, 1880), pp. 86, 87. This Journal gives us the only insight into the debates of the First Senate that can be had, and is a very spirited record, full of characteristic touches, and portraits of the time from the pen of a conscientious democrat. It is but little known, but is deserving of close study.



too few, but that if the provision for Circuit Courts was struck out, they would be too many. Ellsworth then arose and made an elaborate argument upon the necessity of a numerous bench of judges. He enlarged upon the importance of the causes that would come before them; of the dignity it was necessary to support, and held up to view the twelve Judges of England, in the Exchequer Chamber. Maclay retorted that the whole mass of litigation in the Kingdom came before these judges—the whole judicial business of eight or nine millions of people, but in America it was wholly different; the mass of causes would remain with the State Judges. Those only arising from Federal laws would come before the Federal Judges, and there would, comparatively, be few, indeed. When they became numerous, it would be time enough to increase the judges. Grayson repeated his opinion that numbers were necessary to procure respectable decisions. Maclay replied that the way to secure respectable decisions was to choose eminent characters for judges—that numbers lessened responsibility, and, unless they were all eminent, tended to obscure the decisions. The clause providing that the Supreme Court should consist of a Chief Justice and five Associates was then passed.<sup>1</sup>

A debate then arose whether there should be Circuit Courts or Courts of *Nisi prius*. The distinction was started by the learned Dr. Johnson, of Connecticut. Pierce Butler adopted it and spoke for the greater part of a day. The vote was in favor of thirteen district courts.

The clause relating to oaths was then considered; Maclay moved to amend so that all persons conscientiously scrupulous of taking an oath should be permitted to affirm. Great

<sup>1</sup> Maclay's "Sketches of Debate," p. 88.

opposition was manifested. The Quakers were abused by Ralph Izard of South Carolina. Robert Morris and Maclay defended them, and the latter "ran Ellsworth and the other anti-affirmants so hard on the anti-constitutionalism of the clause, that they at last consented to have a question whether the clause should not be expunged; and expunged it was."<sup>1</sup>

Maclay then pointed out where Ellsworth in his diction in the bill had varied from the Constitution. "This bill is a child of his, and he defends it with the care of a parent, even with wrath and anger. He kindled, as he always does when it was meddled with. Lee, however, after some time, joined me. Although the President, John Adams, showed himself against us, we carried the amendment."<sup>2</sup>

Maclay then attacked a clause by which a defendant was required, on oath, to disclose his or her knowledge in the cause. He could not pass in silence such inquisitorial powers. Extorting evidence was a species of torture, and inconsistent with the spirit of freedom. No man should be compelled to give evidence against himself. Paterson moved to strike it out. Ellsworth defended it, now in chancery, now in common law, and now common law with a chancery side, and "then threw the common law back all the way to the wager of law, which he asserted was still in force." Strong rose and took the other side. Bassett rose; Read rose, and the rage of speaking caught the Senate. Paterson appealed to the feudal system, and pointedly denied all of Ellsworth's positions. The motion to strike out then prevailed.<sup>3</sup>

A clause was then taken up, "that suits in equity shall not be sustained in either of the Courts of the United States in any case where a remedy may be had at law." After a

<sup>1</sup> Maclay's "Sketches of Debate," p. 89.    <sup>2</sup> *Ibid.*, p. 90.    <sup>3</sup> *Ibid.*, p. 93.

long debate, in which all the leading lawyers participated, a motion to adopt was carried, but not without a violent assault upon Chancery proceedings by Maclay.

The bill was then taken up on third reading. Ellsworth had led in its support, backed by Strong, Paterson, Read and Bassett. At the same moment that Maclay made an entry in his Journal that he could scarcely account for his dislike of the bill, and that he really feared it would become the Gun-powder Plot of the Constitution, Chief-Justice McKean, of Pennsylvania, James Wilson, Miers Fisher, Richard Peters, Tench Coxe and other members of the bar approved in writing of its general outlines. Maclay again attacked it, ridiculing the delays of Chancery. John Adams, who was in the Chair, said that there was an instance of a cause being finished by the present Chancellor in his life-time, to which it was retorted: One swallow does not make a summer. As a general result of chancery proceedings, both parties were ruined. Plum is matched to plum. Where the parties were poor, the exhausted litigants dropped into ruin about one-fourth of the way through.

On the 17th of July the engrossed bill was read and passed by a vote of fourteen to six. Maclay could not conceal his disappointment and bitter dislike, for he entered in his Journal:

"I opposed this bill from the beginning. It certainly is a vile law system, calculated for expense, and with a design to draw by degrees all law business into the Federal Courts. The Constitution is meant to swallow all the State Constitutions, by degrees; and this to swallow, by degrees, all the State judiciaries. This, at least, is the design some gentlemen are aiming at."

In the House of Representatives the bill was supported by Fisher Ames, Theodore Sedgwick and Egbert Benson, against

the assaults of Livermore of New Hampshire, and Jackson of South Carolina. The former could not conceive why the system had been devised unless it be to plague mankind. He saw a foundation laid for discord, civil war and all its concomitants. To avert these evils he hoped the House would reject the bill.<sup>1</sup>

Inveterate prejudice and stubborn pride of State sovereignty, strange terror at the distant adumbration of the Nation; singular perplexity over what seems to us to be so clear! Posterity has not approved of these condemnatory judgments. On the contrary, the merits of the bill have been loudly applauded, and its distinguished author has been spoken of in terms of peculiar reverence by the American bar. One of his eulogists has declared that the whole Federal judicial system—"the whole edifice, organization, jurisdiction and process, was built by him as it now stands."<sup>2</sup> Although this must be regarded as extravagant, yet no one will deny to Ellsworth the high praise due to the fact that the judicial structure raised by him has stood the test of time, and remains to-day, in its essential features, the same as when it came from the hands of its founder.

The bill was approved by Washington on the 24th of September, 1789. It provided that the Supreme Court of the United States should consist of a Chief Justice and five Associate Justices, any four of whom should be a quorum, and should hold annually at the seat of government two sessions, commencing on the first Monday of February and the first Monday of August. The Associate Justices were to rank according to the date of their commissions, or when the com-

<sup>1</sup> Annals of Congress, Vol. I, pp. 784, 785.

<sup>2</sup> Wharton's "State Trials," p. 41.

missions bore date on the same day according to their respective ages.

The Court was empowered to appoint a clerk, and his oath of office was prescribed. The oath of the Justices of the Supreme Court was directed to be that they would "administer justice without respect to persons, and do equal right to the poor and to the rich," and that they would faithfully and impartially perform all the duties incumbent upon them, according to the best of their abilities and understanding, agreeably to the Constitution and Laws of the United States.

It was provided that the Supreme Court should have exclusive jurisdiction of all controversies of a civil nature where a State is a party, except between a State and its citizens; and except also between a State and citizens of other States, or aliens, in which latter case it shall have original, but not exclusive jurisdiction; and shall have exclusively all such jurisdiction of suits or proceedings against ambassadors or other public ministers or their domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive jurisdiction, of all suits brought by ambassadors or other public ministers, or in which a Consul or Vice-Consul shall be a party.

It was expressly provided that the trial of issues in fact in the Supreme Court, in all actions at law against citizens of the United States, should be by jury.

The appellate jurisdiction of the Supreme Court from the Circuit Courts and Courts of the several States was specially provided for in the famous 25th Section, and power was given to issue writs of prohibition to the District Courts when proceeding as Courts of Admiralty and maritime jurisdiction, and writs of mandamus in cases warranted by the principles and

usages of law to any Courts appointed or persons holding office under the authority of the United States.

The Supreme Court was not to issue execution in cases removed before them by writs of error, but was directed to send a special mandate to the Circuit Court to award execution thereupon.

The remaining provisions of the Bill related to the division of the United States into thirteen districts, and three circuits; the establishment of a District Court in each District, and provisions for the holding of special District Courts. The Circuit Courts were to consist of any two Justices of the Supreme Court and the District Judge of such District, any two of whom were to constitute a quorum, provided that no District Judge should give a vote in any case of appeal from his own decision, but might assign the reasons in support of it. The jurisdiction of the District and Circuit Courts were then regulated and distributed, and special provisions made as to matters of practice; the entry of special bail; the production of books and writings; the granting of new trials; the awarding of executions; the finality of decrees; the regulation of appeals and writs of error; the appointment of Marshals; the default of his deputies; the regulation of trials in cases punishable by death; the drawing of juries; the mode of proof; the taking of depositions *de bene esse*. Finally it was provided that parties in all Courts of the United States might personally plead and manage their own causes, or by the assistance of such counsel or attorneys at law as by the rules of the said Court should be permitted to practice therein. An attorney for the United States was to be appointed in each District, and an Attorney-General for the United States whose duty it should be to prosecute and conduct all suits in the Supreme Court in which the United States should be con-

cerned, and to give his advice and opinion upon questions of law when required by the President, or when requested by the heads of any of the Departments touching any matters that may concern their Departments.<sup>1</sup>

Such were the leading features of the first Judiciary Act of the United States, and it only remained for the President to appoint, and the Senate to confirm, judges to fill the positions which had been created in order to organize the judicial department of the Government.

<sup>1</sup>See "Laws of the United States of America" (Phila. 1796), Vol. I, pp. 47-75.

# PART III.

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## THE SUPREME COURT OF THE UNITED STATES.

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### CHAPTER XI.

ORGANIZATION OF THE COURT: JUDGES FIRST APPOINTED: WASHINGTON'S LETTERS: BIOGRAPHICAL SKETCHES OF JAY, RUTLEDGE, CUSHING, HARRISON, WILSON, BLAIR: FIRST SESSION OF THE SUPREME COURT OF THE UNITED STATES: ADOPTION OF RULES: SKETCH OF IREDELL: CIRCUIT COURT DUTIES: SUITS BY CITIZENS AGAINST A STATE: SKETCH OF JOHNSON: HAYBURN'S CASE: ASSERTIONS OF JUDICIAL INDEPENDENCE: STATE TRIALS.

THE ink was still wet upon the signature of the President to the Judiciary Act when he sent to the Senate the following names: for Chief Justice, John Jay; for Associate Justices, John Rutledge, James Wilson, William Cushing, Robert H. Harrison and John Blair. On the 26th of September the appointments were confirmed. In the order of date of commissions as actually issued, Wilson was postponed to Rutledge, Cushing and Harrison.

At the same time Edmund Randolph was appointed Attorney-General.

The motives which governed Washington in making these selections are visible in his correspondence. To his nephew, Bushrod Washington, he wrote:

“My political conduct in nominations, even if I were uninfluenced by principle, must be exceedingly circumspect and proof against just criticism; for the eyes of Argus are upon me, and no slip will pass unnoticed that can be improved into a supposed partiality for friends or relatives.”<sup>1</sup>

<sup>1</sup> Letter dated 27 July, 1789, Sparks' "Writings of Washington," Vol. X, p. 24.



To Madison, a few days later, he expressed the utmost solicitude for drawing the first characters of the Union into the judiciary and his regret that Edmund Pendleton was too old to be appointed to the Supreme Court. For Randolph in the character of Attorney-General he declared a preference to any person with whom he was acquainted of not superior abilities, from habits of intimacy with him.<sup>1</sup>

To the Judges themselves he addressed letters, stating that he considered the judicial system as the chief pillar upon which our National Government must rest; that he had thought it his duty to nominate for the high offices in that department such men as he conceived would give dignity and lustre to our national character, and he flattered himself that the love which they had to their country, and a desire to promote the general happiness, would lead them to a ready acceptance of the commissions enclosed, which were accompanied by a copy of the Judiciary Act.<sup>2</sup> To Jay he wrote in the warmest terms, conveying the singular pleasure with which he addressed him as Chief Justice, and confessing that in nominating him he not only acted in conformity to his best judgment, but did a grateful thing to the good citizens of the United States. He begged him not to hesitate a moment in bringing into action the talents, knowledge and integrity which were so necessary to be exercised at the head of that department which must be considered as the keystone of our political fabric.<sup>3</sup>

We are assured by his son that Jay preferred the Chief Justiceship to the various offices tendered him, as the sphere

<sup>1</sup> Letter, 10th August, 1789, Sparks' "Writings of Washington," Vol. X, p. 26.

<sup>2</sup> Letter to the Judges, September 30th, 1789, *Ibid.* p. 35.

Letter to Jay, 5th October, 1789, *Ibid.* p. 35.

in which for the future his talents could be most usefully exerted.<sup>1</sup> At that time he was acting as Secretary for Foreign Affairs. He was but little more than forty-four years of age, almost six feet in height, of thin but well-formed person, of colorless complexion, with black, or, as some say, blue, penetrating eyes, aquiline nose and pointed chin. His hair was usually drawn back from his forehead, tied behind and lightly powdered. His manners were gentle and unassuming.<sup>2</sup> He was neither a brilliant advocate nor a profoundly learned lawyer nor a master of the technique of practice. His public duties had been too exacting to permit him to labor in the forum. He was rather a statesman and a jurist than a pleader of causes. But his character was "a jewel in the sacred treasures of national reputation, and when the spotless ermine of the judicial robe fell upon him, it touched nothing not as spotless as itself."<sup>3</sup>

He was judicious and prudent, rather than emotional, retired in disposition, dignified, self-controlled, conscientious, just and wise, remarkable, as his friend, Lindley Murray, wrote, for strong reasoning powers, comprehensive views, indefatigable industry and uncommon firmness of mind. Judgment, discriminative, penetrating, was the characteristic of his understanding. If over his other faculties imagination had presided, the compass of his thought would have been enlarged, and grace and flexibility been imparted to his mind.<sup>4</sup> He wrote at all times with great clearness and force, and occa-

<sup>1</sup> William Jay, "Life and Writings of John Jay," New York, 1833, Vol. I, p. 275.

<sup>2</sup> Sullivan's "Letters on Public Characters," p. 59.

<sup>3</sup> Webster's Speech in the City of New York, March 10, 1831.

<sup>4</sup> William Jay, "Life of John Jay;" Henry Flanders, "Lives and Times of Chief Justices," Vol. I, p. 429; George Pellew, "John Jay," in "American Statesmen" Series.

sionally with extreme elegance of expression. Of the gifts of the orator he had none. His paternal ancestors were French Huguenots, who had been driven from their native land by the fury of persecution which followed the revocation of the Edict of Nantes. In time they found their way to South Carolina, but subsequently, on account of the climate, thought it advisable to go to New York. There, on the 12th of December, 1745, John Jay was born, the eighth of a family of ten children. His mother was of Dutch extraction. After a preliminary course at a grammar school, and instruction from a private tutor, he entered Columbia (then King's) College, and after graduation pursued the study of the law in the office of Benjamin Kissam. After his admission to the bar he was successful in obtaining practice, but before he had an opportunity of becoming distinguished in his profession was drawn into the vortex of politics.

Notwithstanding his youth, he became one of the most active and influential spirits of the early Revolutionary period. In 1774 he was sent as a delegate to the First Continental Congress, which assembled at the Hall of the Carpenters' Company in Philadelphia, and found himself, with the single exception of Edward Rutledge, the youngest member of that august body. With none of the headlong impetuosity or fiery zeal of Henry, Rutledge and Adams, he prudently abstained from the vain effort to compete with those splendid orators; but he won world-wide renown as the author of the Address to the People of Great Britain,—a paper which drew forth the encomiums of the Earl of Chatham by its able and dignified statement of the rights, and glowing portrayal of the wrongs of the Colonies. He also served as a member of the Committee of Correspondence, and is supposed to have written the reply to the Boston Address, in which he opposed

the project of non-intercourse. He wrote also the Address to the People of Canada, and, at the request of his father-in-law, Governor William Livingston, of New Jersey, an Address to the Inhabitants of Ireland. He continued to serve as a member of Congress until his recall in May, 1776, to assist in framing a government for New York, and thus narrowly missed the immortality which glorifies the names of the Signers of the Declaration of Independence. In his own State he prepared a Bill of Rights, and took a leading part in framing the Constitution; in fact, it is claimed that he was its author. He acted as a member of the Council of Safety, and was appointed Chief-Justice of New York in September, 1776,—an office which he held until December, 1778, when he was again sent to Congress, where he presided over its deliberations as the successor of Henry Laurens. He then entered upon the wider theatre of diplomacy. He was sent to Spain to negotiate a loan of two millions of dollars and the freedom of the Mississippi. With Franklin, Adams and Laurens he negotiated the Treaty of Peace, and, returning to New York, was appointed by Congress Secretary of Foreign Affairs. In October, 1786, he drew up an elaborate report on the relations between the United States and Great Britain. Although not a member of the Federal Convention, he took a leading part in the advocacy of the new government, contributing five numbers to "The Federalist," and a pamphlet and eloquent Address to the People of the State of New York on the subject of the Constitution. He favored the national idea. In 1785 he had written: "It is my first wish to see the United States assume and merit the character of one great nation, whose territory is divided into different States merely for more convenient government, and the more easy and prompt administration of justice,—just as our several





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States are divided into counties and townships for the like purposes." Ripe in experience, and thoroughly tried in many responsible and conspicuous positions, in all of which he had conducted himself with lofty disinterestedness and unyielding integrity, his calmness of temperament, accuracy of judgment, unblemished character and sound views upon public questions commended him to the sagacious choice of Washington as the publicist and jurist best fitted to elevate and adorn the judiciary of the nation and to preside over the deliberations of its supreme tribunal.

The Associate Justices were also men of national reputation. John Rutledge was the son of Dr. John Rutledge, who, with his brother Andrew, both natives of Ireland, settled in Charleston, South Carolina, where, in the year 1739, the future Associate and Chief-Justice of the United States was born. The historian, Dr. Ramsay, says: "In the friendly competitions of the States for the comparative merits of their respective statesmen and orators, while Massachusetts boasts of her John Adams, Connecticut of her Ellsworth, New York of her Jay, Pennsylvania of her Wilson, Delaware of her Bayard, Virginia of her Henry, South Carolina rests her claim on the talents and eloquence of John Rutledge." After an excellent classical education, Rutledge entered as a law student in the Temple, in London, and proceeding barrister, came out to Charleston, and began the active work of the profession in 1761. In his first cause—an action for breach of promise of marriage—his eloquence astonished all who heard him. His business became large, and he at once took rank among the able members of the bar. With Gadsden and Lynch, he was sent to the Congress at New York in 1765, and his bold denunciation of the Stamp Act filled with wonder the members of distant provinces. He returned to the bar, and for

ten years devoted himself exclusively to practice. In 1774 he became a member of the First Continental Congress, and Patrick Henry called him the foremost orator of that body. He remained in this branch of public service for two years, and was then elected President and Commander-in-Chief of his native State. Thenceforth his duties were executive. The following anecdote is quoted as a sample of the spirit with which he acted. He wrote to General Moultrie, who commanded Sullivan's Island, in the harbor of Charleston, this laconic note: "General Lee wishes you to evacuate the fort. You will not without an order from me. I would sooner cut off my hand than write one." In 1778 he became the Governor of the State under the new Constitution, and made great exertions to repel the British invasions, to defend Charleston in the year 1779-80, to procure the aid of Congress and of the adjacent States, and to revive the suspended legislative and judicial powers of the State. His genius for organizing was superb. In 1782 he was again sent to Congress. The next year he was appointed Minister Plenipotentiary to Holland, but declined the office. He was then elected a Judge of the Court of Chancery in his own State, and his duties, from this time forth, were almost exclusively judicial. His legal learning is said to have been great. He was one of the most active of the Southern members of the Federal Convention, and exerted himself strenuously to induce his countrymen to ratify the Constitution. These services constituted his brief of title to the confidence which led Washington to place his name next to Jay's in the list of appointments to the Federal judiciary.

William Cushing, who was the first representative of New England upon the bench of the Supreme Court was a man of good stature, erect, graceful, and dignified, of fair com-





*Wm. Gushing*







Engraved by Albert Rosenthal (Phila. 1889) after J. Trumbull

Not a man

plexion, blue eyes, and enormous nose; in dress adhering to the style of the Revolution, wearing a three-cornered hat, wig, and small clothes, with buckles in his shoes, a gentleman of the old school, affable and courteous; in politics a Federalist of the Washington type. He was born at Scituate, in Massachusetts, on the 1st of March, 1732. His father was a member of the Supreme Court of the State, and was one of the Judges who presided at the trial of the British soldiers for the massacre of citizens in the streets of Boston on the 5th of March, 1770. The son was a graduate of Harvard, which afterwards conferred on him the degree of LL.D. He pursued his professional studies under the direction of Jeremiah Gridley, and at an early age was appointed a judge of probate. He succeeded his father as a Judge of the Supreme Judicial Court, and, at the outbreak of the Revolution, alone of all those high in office supported the rights of his country. At town meetings he was an eloquent and invincible speaker. He became the first Chief Justice of Massachusetts under the Constitution of 1780, an office which he held at the time of his promotion to the Supreme Court of the United States. His mental characteristics were eminently judicial.

Robert Hanson Harrison, though almost unknown to the present generation, was a special favorite of Washington, owing to the close and confidential relation he sustained to his chief during the war of the Revolution. He was born in Charles County, Maryland, in 1745, and was the son of Richard Harrison and Dorothy, daughter of Robert Hanson. He was bred to the law, but at the age of thirty-one preferred to leave his clientage for the service of his country. On the 16th of May, 1776, he succeeded Joseph Reed as Secretary to General Washington, with the rank of Lieutenant-Colonel, and remained a member of the military family of the Commander-

in-Chief until the spring of 1781. He is described in one of the letters of the General as "sensible, clear, and perfectly confidential." He was appointed by Congress a member of the Board of War, but declined the position. He participated in the Battle of Long Island, the operations near White Plains, the action at Chatterton's Hill and the Battle of Brandywine. He also served as a Commissioner for the exchange of prisoners. In March, 1781, he was appointed Chief Judge of the General Court of Maryland, an office which he held when, in the balloting for a first Vice-President in the electoral college, he received the six votes of his native State. Five days after his confirmation as an Associate Justice of the Supreme Court of the United States he was unanimously chosen Chancellor of Maryland. He hesitated for some time before making a choice between the two positions, but finally determined in favor of the latter. In a letter, dated 25th November, 1789, Washington acknowledged the return of the commission, but finding that one of the reasons that induced him to decline the appointment was an objection to the Judiciary Act, suggested that such a change in the system was contemplated as would permit him to pay as much attention to his private affairs as his present station, and declared that he thought it proper to return his commission, not for the sake of urging him to accept it contrary to his interests or convenience, but with a view of giving him a further opportunity of informing himself as to the nature and probability of the change alluded to.<sup>1</sup> In the end he again declined, preferring the State office. He died, however, in the following April at his seat on the Potomac, near Port Tobacco, in the

<sup>1</sup> Letter of Washington to Harrison, Nov. 25th, 1789. Sparks' "Writings of Washington," Vol. X, p. 52.





*James Wilson*



forty-fifth year of his age, and Washington wrote to Lafayette: "Poor Colonel Harrison, who was appointed one of the Associate Judges of the Supreme Court and declined, is lately dead."<sup>1</sup>

James Wilson was in some respects the ablest member of the first Supreme Court. He stood in the very foremost rank at the bar, and though he had been called upon on frequent occasions to discharge public duties, yet as they were all performed in the city of Philadelphia during the sessions of Congress, and the Federal and State Conventions, he was able to devote himself to an important and varied practice, without suffering as others did from a long absence from home. His attainments in the law were such as to lead the King of France to commission him as *Avocat général de la Nation Française à Philadelphie*, and bestow upon him the sum of ten thousand livres; while Washington, passing by the Wythes and Pendletons of Virginia, selected him as the preceptor of his nephew, Bushrod Washington.<sup>2</sup> There is evidence that he was thought of by his friends as likely to be called upon to fill the highest judicial position in the nation.<sup>3</sup>

<sup>1</sup>Letter of 3d June, 1790. Sparks' "Writings of Washington," Vol. X, p. 250.

<sup>2</sup>The writer is in possession of the original of the following note: "Philada., March 22, 1782. I promise to pay James Wilson Esq: or order on demand one hundred guineas, his fee for receiving my nephew, Bushrod Washington, as a Student of Law in his office. G. Washington." Endorsed: "Received 23 July, 1782, from his Excellency, General Washington, one hundred guineas in full of the within note. James Wilson." Endorsed in handwriting of Washington: "Rect. No. 135—James Wilson Esq., 100 Guineas, 23 July, 1782."

<sup>3</sup>In a letter of General Anthony Wayne to Wilson, dated the 20th of May, 1789, he congratulates him upon the adoption and organization of the Federal Constitution—"a business in which you took so early, so conspicuous and so effectual a part, and permit me to add that it was to a display of the perfect knowledge you entertained and the plain elucidation you gave of the component parts of that system, which caused it to be approved by the Convention of Pennsylvania, it

It is not known whether Wilson himself ever raised his eyes to the first place; certain it is that he did not permit disappointment to sour him. He accepted the position tendered with great cheerfulness, and, on the 5th of October, appeared before the Mayor of Philadelphia and voluntarily took the oath of office prescribed by the Judiciary Act.<sup>1</sup> His education and public experience had fully prepared him for the post. He was a native of Scotland, and had studied at Glasgow, St. Andrew's, and Edinburgh, under Dr. Blair, in Rhetoric, and in 1763, at the age of twenty-one years, had emigrated to New York, and in 1766 arrived in Philadelphia. His attainments in the classics were remarkable; the student of his literary remains cannot fail to be impressed by the evidence

being the first that met, and the first in consequence in the Union and perhaps its present operation may justly be attributed to the happy *turning of the scale* in that State. I therefore hope and trust that I may with propriety venture to congratulate you upon an appointment, so generally acknowledged, due to your professional and other merits, *i.e.*, the *Chief Justiceship* of the United States of America." The original of this letter, which has never been published, is in the possession of Thos. H. Montgomery, Esq., of Philadelphia, who received it from the grand-daughter of Judge Wilson. The latter part of it is characteristic and interesting. After winning Wilson's good will by this not carefully concealed flattery, he recommends a friend for office, and then asks that Wilson use his best interest to secure for himself "an appointment in the Southern Department similar to that which General St. Clair enjoys to the Westward and to which I have *some claims* as well from my past unrewarded services, as from the knowledge I have of the country and of the *Creeks*, *Choctaws* and other nations of Indians whom I have more than once defeated in the field, and afterwards concluded a treaty of peace, honorable and advantageous to this country and satisfactory to them, which may be seen among the papers of Congress and those of his Excellency, the President of the United States of America." Little did Wayne at the time dream that he would be sent into the West to retrieve the defeats which overwhelmed St. Clair, and that victory would crown him on the banks of the Miami.

<sup>1</sup>Original certificate under the hand and seal of the Mayor of Philadelphia, in the possession of the grand-daughter of Judge Wilson. I have not been able to find any other record of the manner in which the Chief Justice and remaining Associates were sworn. It may be that they all pursued a similar course.

of his familiarity with the history and philosophy of Greece and Rome. For a short time he was a tutor in the College of Philadelphia. He subsequently studied law in the office of John Dickinson, and after some years of practice at Reading, Carlisle and Annapolis, came to Philadelphia, and was admitted to the bar of that city in December, 1778. His political experience was great. An ardent advocate of American Independence, he was for six years a member of Congress, though not continuously, and was concerned in all the measures of government both during and after the war. He was one of the signers of the Declaration. In the principles of finance and constitutional law as it then existed he was particularly learned. As an orator he held high rank both as an advocate and a parliamentary debater. He was one of the ablest and most active of the members of the Federal Convention, and his speeches in the Convention of Pennsylvania, called to adopt or reject the new Constitution will compare favorably as luminous expositions of the work he had helped to perform, with any of the arguments in its favor to be found reported in Elliott's Debates. He was a man of large and powerful frame, with an open, honest face, with bright blue eyes beaming mildly from behind a pair of heavy silver-rimmed spectacles; his mouth was large and expressive.

John Blair, the last in commission of the Associate Justices, was of slight frame, but with an astonishing breadth of brow, particularly between the eyes, which were brown in color, surmounted by a bald forehead fringed with scanty locks of red hair, which fell over his ears. His lower lip protruded in a singular way, like the bill of a bird. He was born in the City of Williamsburg, Virginia, in 1732, and was educated at William and Mary College. His family was one

of fortune and powerful connections. Bred to the bar, he studied in the Temple and became a barrister; on his return he settled in his native city, where he acquired a considerable share of the current legal business. In 1766 he became a member of the House of Burgesses, and ten years later was one of the committee of the Convention which drew up a plan for the government of the State. In 1779 he was made Chief Justice of the General Court, and on the death of Judge Nicholas was appointed a member of the High Court of Chancery, and by virtue of both stations was a Judge of the first Court of Appeals. He served as a member of the Federal Convention, as well as of his State Convention; and though not aggressive in his advocacy, was a firm supporter of the Constitution. He was regarded by his contemporaries as an able man, amiable in disposition, blameless and pious, possessed of great benevolence and goodness of heart.

On the first Monday of February, being the first day of the month, 1790, in the City of New York, then the seat of the National Government, Chief Justice Jay and Justices Cushing and Wilson appeared in the Court room which had been provided at the Exchange. John McKesson, acted as clerk. No quorum being present, the Court adjourned to the following day, when, Justice Blair having arrived, with Edmund Randolph, the first Attorney-General, the Court was formally opened in the presence of the Chief Justice and other judges of the Supreme Court of New York, the Hon. James Duane, United States District Judge, the Mayor and Recorder of New York City, the Marshal of the District, the Sheriff and other officers, and a great number of the gentlemen of the bar.<sup>1</sup>

<sup>1</sup> Gazette of the United States, Feb. 3, 1790, No. Lxxxv. New York letter dated Feb. 4th, in the Pennsylvania Journal and Weekly Advertiser, February 10, 1790.



*John Blair jun?*



The Jury from the District Court was also in attendance, many members of Congress and a number of respectable citizens.<sup>1</sup> Proclamation was made, and the commissions of the Judges and of the Attorney-General were read and published. Richard Wenman was appointed cryer.<sup>2</sup> The next day John Tucker, Esq., of Boston, was appointed Clerk, and it was ordered that he reside and keep his Office at the seat of the National Government, and that he do not practice either as counsellor or attorney so long as he acted as Clerk.<sup>3</sup>

After oath had been administered and a bond approved, the Court adjourned for the day. In the evening the Grand Jury for the United States, in the district, gave "a very elegant entertainment" in honor of the Court at Francis' Tavern in Courtlandt Street. "The liberality displayed on this occasion and the good order and harmony which presided gave particular satisfaction to the respectable guests."<sup>4</sup>

The next morning Elias Boudinot, of New Jersey, Thomas Hartley, of Pennsylvania, and Richard Harrison, of New York, were severally sworn as by law required, and were ad-

<sup>1</sup> Pennsylvania Packet and Daily Advertiser, Feb. 6, 1790.

<sup>2</sup> Minutes of the Supreme Court of the United States.

<sup>3</sup> Minutes of the Supreme Court. Mr. Tucker was selected by Jay; his character is stated to have been most exemplary. William Jay, "Life of John Jay," Vol. II, p. 201.

<sup>4</sup> Letter dated Feby. 10, 1790. Gazette of the United States. After dinner the following toasts were drunk: The President of the United States; The Vice-President; The National Judiciary; The Senate of the United States; The Speaker and House of Representatives; The late National Convention; The Constitution of our Country, —May it Prove the Solid Fabrick of American Liberty, Prosperity and Glory; The Memory of the Heroes who Fell in Defence of the Liberties of America; His Most Christian Majesty and the People of France; The Convention of Rhode Island, —May their Wisdom and Integrity soon introduce our Stray Sister to her Station in the Happy National Family of America.

mitted as counsellors, their names being enrolled upon parchment.<sup>1</sup>

After a few moments of quiet consultation, the Judges adopted Rules, by which it was declared and established that the Seal of the Court shall be the arms of the United States, engraved on a piece of steel of the size of a dollar, with these words in the margin: "The Seal of the Supreme Court of the United States," and that the seals of the Circuit Courts shall be the arms of the United States, engraven on circular pieces of silver of the size of a half dollar, with these words in the margin, in the upper part: "The Seal of the Circuit Court," and in the lower part the name of the district for which it is intended. It was further ordered that it should be requisite to the admission of attorneys and counselors to practice in this Court that they shall have been such for three years past in the Supreme Court of the State to which they respectively belong, and that their private and professional character shall appear to be "fair." It was also ordered that counselors should not practice as attorneys, nor attorneys as counselors, and that they should be sworn to demean themselves as officers of the Court agreeably and according to law, and that they would support the Constitution of the United States. It was also ordered that all process of the Court should be in the name of the President of the United States. Thereupon the Court adjourned to the first Monday of August following, as fixed by law.<sup>2</sup>

Not a single litigant had appeared at their bar. The silence had been unbroken by the voice of counsel in argument. The table was unburdened by the weight of learned

<sup>1</sup> Minutes of the Supreme Court. Parchment roll in the Office of the Clerk of the Supreme Court.

<sup>2</sup> Minutes of the Supreme Court.



briefs. No papers were on file with the Clerk. Not a single decision, even in embryo, existed. The Judges were there; but of business there was none.

Not one of the spectators of that hour, though gifted with the eagle eyes of prophecy, could have foreseen that out of that modest assemblage of gentlemen, unheard of and unthought of among the tribunals of the earth, a Court without a docket, without a record, without a writ, of unknown and untried powers, and of undetermined jurisdiction, there would be developed, in the space of a single century, a Court of which the ancient world could present no model, and the modern boast no parallel; a Court whose decrees, woven like threads of gold into the priceless and imperishable fabric of our Constitutional jurisprudence, would bind in the bonds of love, liberty and law the members of our great Republic. Nor could they have foreseen that the tables of Congress would groan beneath the weight of petitions from all parts of the country inviting that body to devise some means for the relief of that overburdened tribunal whose litigants are now doomed to stand in line for a space of more than three years before they have a chance to be heard.

James Iredell was appointed on the day upon which the Court rose in the place of Harrison, his commission being dated February 10, 1790. He was born at Lewes, England, October 5, 1751, (N. S.), and was of Irish extraction. Tradition says that the family name was originally Ireton, and that they were collateral descendants of the son-in-law of Cromwell; and that when at the Restoration the body of the great Protector was dug up and exposed upon the gibbet at Tyburn, prudence dictated a change of name so as to escape the fury of the royalists.<sup>1</sup> However that might be, there was no trace of

<sup>1</sup>McRee, "Life and Correspondence of James Iredell," Vol. I, p. 1.

ancestral pusillanimity in the judge: he was ever bold and outspoken in speech and courageous in conduct. At the age of seventeen he arrived in Boston, and was deputed by the commissioners for managing the royal customs to act as comptroller at Edenton, North Carolina, where, soon after his arrival, he entered on the study of the law, under the direction of Samuel Johnston. For six years he prepared all the accounts, returns and exhibits, and kept the books of the Custom House. For an uncle, who resided in England, he sold and leased lands, collected rents and fees, remitted by bills of exchange and cargoes of corn and pork.<sup>1</sup> In this way he acquired a thorough knowledge of business, while devoting all his leisure moments to the law. He was admitted to the bar in 1770, and slowly but steadily forced his way to leadership. He became a deputy to the Attorney-General, and an active political writer upon the topics of the day. In 1777 he was elected to the bench of the District Court, but held his office only a year.<sup>2</sup> During that time he delivered addresses to grand juries which were published by request as a means of invigorating the timid, rousing the indifferent, reclaiming the disaffected and calling the united strength of the people to the support of the American cause. Shortly after this he became Attorney-General, and later a Councillor of State. In the famous State trials at Warrenton he bore a conspicuous part, and his argument, sustaining the power of a Court to declare an act of the legislature void because of an infringement of the Constitution, was a splendid instance of his bold and original methods of reasoning, and his power of illustration and statement. About this time the State was convulsed by the contest over the ratification of the Constitution, and Iredell's

<sup>1</sup> McRee, "Life and Correspondence of James Iredell," Vol. I., p. 54.

<sup>2</sup> *Ibid.*, p. 367.



*J. Hedley*



"Reply to the Objections of George Mason," raised him in the opinion of competent judges to the position of the ablest legal reasoner in the State. No one contributed more than he to bring about the amazing change in the sentiments of the people which was evinced at the final election.<sup>1</sup> Mr. Iredell had just completed his labors as commissioner to revise the laws of his adopted State, when he was appointed to the vacant position in the Supreme Court of the United States. This appointment was made without any solicitation upon his part. He had been led to think that he would be made District Judge for North Carolina, and when the higher dignity was tendered, it was to him a matter of agreeable surprise. It is said that Washington derived his conviction of Iredell's merit from a perusal of the debates in the North Carolina Convention and the famous Reply to George Mason's Objections.<sup>2</sup> His confirmation by the Senate was unanimous, and Pierce Butler in a graceful letter congratulated the States that they would no longer be deprived of his aid and the benefit of his abilities.

The first service performed by the Judges was upon Circuit. The Chief Justice and his associate, Cushing, with Duane, the District Judge, held the first Circuit Court, for the Eastern Circuit, in New York City, upon April 3, 1790. Jay delivered an elaborate charge to the Grand Jury, in which he inculcated the principles of morality and advised submission to Constitutional authority. Wilson and Blair went upon the Middle Circuit, while the Southern Circuit was attended by Rutledge and Iredell.<sup>3</sup> It was expected that the Judges would

<sup>1</sup> Letter of Chas. Johnson (Speaker of the Senate), to Iredell, Nov. 23, 1789. McRee's "Life of Iredell," Vol. II, p. 273.

<sup>2</sup> *Ibid.*, Vol. II, p. 279.

<sup>3</sup> The Eastern Circuit embraced the Districts of New Hampshire, Massachu-

take these in rotation.<sup>1</sup> In traveling through New England Jay declined every invitation of his friends to lodge with them, preferring to go to public houses. To one he wrote: "As a man, and as your friend, I should be happy in accepting your invitation, but, as a judge, I have my doubts—they will occur to you without details." At New Haven he was met by a body of the citizens who escorted him as far as his inn. Boston was lavish of her civilities. Harvard University conferred upon him the degree of Doctor of Laws; Portsmouth honored him with a public entry, and on his departure attended him some distance on his journey.<sup>2</sup> In the autumn he again made the circuit, and held Courts at Boston, Exeter, Providence, Hartford and Albany. Although often urged to interest himself with the President and Heads of Departments in favor of applicants for office, he scrupulously avoided interference, except in the single case of Matthew Clarkson, for the office of Marshal, an office connected with his own tribunal, and in the faithful discharge of which he was officially interested.<sup>3</sup>

We know nothing of what occurred in the Middle Circuit,<sup>4</sup> but we are able to trace, through the charming letters of Judge Iredell to his wife, his journey from Camden to

setts, Connecticut and New York; the Middle Circuit, the Districts of New Jersey, Pennsylvania, Delaware, Maryland and Virginia; and the Southern Circuit, South Carolina and Georgia. Judiciary Act of 1789. Laws of United States, Vol. I, p. 50. At that time North Carolina and Rhode Island had not ratified the Constitution.

<sup>1</sup> Letter of Samuel Johnston to Iredell, March 11, 1790, McRee's "Life of Iredell," Vol. II, p. 285.

<sup>2</sup> An interesting account of "The Circuit Court for the New Hampshire District One Hundred years Ago" is to be found in a paper by Wm. H. Hackett, Esq., "The Green Bag," Vol. II., No. 6, p. 262.

<sup>3</sup> William Jay, "Life of John Jay," Vol. II, p. 277.

<sup>4</sup> No cases are reported by Dallas until April term, 1792.

Charleston and Savannah, in company with Rutledge. The nature of the business which came before them is not stated. From the latter place Iredell proceeded to North Carolina, under the impression that the Judiciary Act had been extended to that State. As this was doubtful, Rutledge remained at home. After a delay at New Berne, without information, the former traveled northward to be present at the August term of the Supreme Court.<sup>1</sup>

In the preceding April President Washington had addressed a letter to the Chief Justice and Associate Justices, stating his sense of the importance of having the judiciary system not only independent in its operations, but as perfect as possible in its formation, and asking them to communicate to him whatever occurred to them in the unexplored fields of their circuits, with whatever remarks they deemed expedient.<sup>2</sup> In reply, the Chief Justice, in a letter which does not appear to have been concurred in by Iredell, urges what he notes as deviations of the Judiciary Act from the Constitution, calling for correction: First, that under the appellate jurisdiction bestowed upon the Supreme Court there was an incompatibility and inconsistency between the offices of Judges of the Supreme Court and Judges of the Circuit Courts, and that they ought not to be held by the same persons; and second, that the assignment by Act of Congress of the Judges of the Supreme Court to Circuit Court duties was an exercise of powers which constitutionally belonged to the President and the Senate, the Constitution not having provided that the judges of the inferior Courts should be appointed "*otherwise*."<sup>3</sup> No immediate result is traceable to

<sup>1</sup> McRee's, "Life of Iredell," Vol. II, p. 291.

<sup>2</sup> Sparks's "Writings of Washington," Vol. X, p. 86.

<sup>3</sup> McRee's "Life of Iredell," Vol. II, p. 295.

this letter, and the point remained undisposed of for several years. Among the last acts of the administration of President Adams was a bill for "the more convenient organization of the Courts of the United States," which will be noticed more particularly in its proper place, by which the Judges of the Supreme Court were relieved from circuit duty entirely, and confined to attendance upon the sessions of their own tribunal. The act was repealed in the following year, and the old system restored, but the opponents of the repeal stoutly maintained that, under the Constitution, Congress could not require the Judges of the Supreme Court to sit at Circuit. Such, it seems, was the opinion of John Marshall, which he endeavored to urge upon his associates, without success. Finally, in the case of *Stuart v. Laird*,<sup>1</sup> it was held that practice and acquiescence, for a period of many years, commencing with the organization of the judicial system, had fixed the construction, and that this contemporary and practical exposition was too strong to be shaken or controverted.<sup>2</sup>

When the Supreme Court met for the second time in New York City, on the first Monday of August, 1790, Rutledge alone was absent. After the publication of Iredell's commission, the admission of several counsel, and directions to the clerk to prepare a seal for the Circuit Court of Rhode Island, an adjournment took place from lack of business.<sup>3</sup>

In the following February the Chief Justice laid before the Court a letter from James Duane, the District Judge of New York, requesting the appointment of a special Circuit Court for the trial of prisoners confined in gaol for breaches of the revenue laws, on the ground that the District Court

<sup>1</sup> 1 Cranch, p. 299 (1803).

<sup>2</sup> See also Van Santvoord's "Lives of the Chief Justices," p. 351.

<sup>3</sup> Minutes of the Supreme Court.



was excluded from jurisdiction of these offences by the extent of the punishment, and that its criminal cognizance thus circumscribed was a burthen to the community without any corresponding advantage. The request was granted, and a similar special court was ordered to be held in Philadelphia for the trial of criminals and the relief of certain sea-faring men who were detained as witnesses.<sup>1</sup>

At the same term the first instance of a suit by an individual against a State, the case of *Vanstaphorst v. The State of Maryland*, appeared upon the record, the Marshal making return that he had served the summons by copy upon the Governor, Executive Council and Attorney-General of the State, in the presence of witnesses. An appearance was entered, without objection of any sort, by Luther Martin as Attorney-General of the State of Maryland, and on motion of Edmund Randolph, the Attorney-General of the United States, the State was ordered to plead within two months.<sup>2</sup> A commission to take the depositions of certain witnesses in Holland, with the consent of the counsel for the defendant State was applied for but refused, until a commissioner was named. This being done the motion was granted.<sup>3</sup> The case was subsequently discontinued, each party agreeing to pay their own costs.

A suit was also brought by *Oswald, administrator, v. The State of New York*,<sup>4</sup> in which after a return of service, a motion was made for a *distringas* to compel the appearance of the State; while the matter was under consideration, leave was given to withdraw the motion and enter a discontinuance. The case was again renewed, and an order made by the Court that unless the State should appear by the following term,

<sup>1</sup> Minutes of the Supreme Court.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> 2 Dallas, 401 (1792).

and show cause to the contrary, judgment would be entered by default.

A question of practice also arose. A writ of error had been presented, issued out of the Office of the Clerk of the Circuit Court for the Rhode Island district, directed to that Court, and commanding a return of the judgment and proceedings therein, and a rule was moved for that the defendants rejoin to the errors assigned. It was objected to the validity of the writ that it had issued out of the wrong office, and after argument, it was unanimously determined that writs of error to remove causes from inferior courts could regularly issue only from the Office of the Clerk of the Supreme Court.<sup>1</sup>

On the 1st of August, 1791, John Tucker resigned as clerk, and Samuel Bayard, of Delaware, was appointed in his stead.<sup>2</sup>

A difference of opinion soon arose among the Judges relative to their circuits, and contrary to the expectation and the wishes of the Southern members of the Court, it was determined that the Judges should be divided into pairs, and each pair be confined permanently to one circuit.<sup>3</sup> Iredell, it seems, was taken by surprise, and Blair voted under a misconception. The burden of "leading the life of a Postboy" in a circuit of vast extent, under great difficulties of travel and peril of life in the sickly seasons, fell heavily upon Iredell, who applied to Congress for relief, but it was not until the Act of 13th of April, 1792, providing that the Judges should ride by turns the circuit most distant from the seat of government, that the difficulty was adjusted.<sup>4</sup>

<sup>1</sup> *West v. Barnes et al.*, 2 Dallas, 401 (1791). Minutes of the Supreme Court.

<sup>2</sup> Minutes of Supreme Court.

<sup>3</sup> McRee's "Life of Iredell," Vol. II, p. 321.

<sup>4</sup> Laws of the United States, p. 234.





Etched by Albert Rosenthal Phila. 1890

*The John Jay*

In the meantime John Rutledge had resigned, and Charles Cotesworth Pinckney and Edward Rutledge having declined in turn, Thomas Johnson was appointed in the recess on August 5th, 1791. In transmitting his commission Washington alluded to the opinion which prevailed against the expediency of continuing the circuits of the Associate Judges, and stated that it was expected that some alterations in the judicial system would be made, with a view of relieving them from disagreeable tours.<sup>1</sup>

Johnson was born in Calvert County, Maryland, in 1732. He was educated under the direction of private tutors, and subsequently studied law, in which he attained great distinction. In 1774 he was a member of the Committee of Correspondence of his State, and the following year was sent as a delegate to the Continental Congress, where he had the felicity of nominating Washington as Commander-in-Chief, a circumstance which led to the most cordial and friendly relations, which were never disturbed. His attachment to the great soldier led him to resign his membership in Congress, and go to the assistance of the American Army then in New England with a small force which he had raised by his personal exertions. He was the first Governor of Maryland under the new State Constitution, and held the position for three years. He warmly advocated internal navigation; on the establishment of the Federal government he was tendered the place of United States District Judge for Maryland, but declined it, and was active in securing the appointment of William Paca, who was one of the signers of the Declaration of Independence. He served as a member of the Board of Commissioners for Locating the District of Columbia. His relations with Wash-

<sup>1</sup>Letter of Washington to Thomas Johnson, 7 Aug., 1791, Sparks's "Writings of Washington," Vol. X, p. 182.

ington continued to be intimate, and he was frequently visited by the President at his estate at Rose Hill, near the city of Frederick. When Jefferson left the Cabinet, the position of Secretary of State was tendered to him but declined. The high order of merit due to his services was attested by John Adams who, when questioned as to how it was that so many Southern men participated in the war, replied that had it not been for such men as Richard Henry Lee, Thomas Jefferson, Samuel Chase, and Thomas Johnson there would never have been any revolution. Johnson was regularly confirmed on the 7th of November, 1791, and took his seat in the following August term, but resigned in less than eighteen months on account of failing health.

A few months prior to this the Judges had asserted with firmness and boldness the independence of the judiciary as a coördinate branch of the government. Congress, by an act to provide for the settlement of the claims of widows and orphans, and to regulate the claims of invalid pensioners, had imposed on the Circuit Courts certain duties, and subjected their action to the consideration and supervision of the Secretary of War, and finally to the revision of Congress. The Chief Justice, with Cushing and Duane, the District Judges, refused to comply, and declared that neither the Legislature nor Executive branches could constitutionally assign to the Judiciary any duties, but such as were properly judicial, and to be performed in a judicial manner; that the duties assigned were not of that description, and that neither the Secretary of War nor any other executive officer, nor even the Legislature were authorized to sit as a Court of Errors. They regarded themselves under the Act, as commissioners merely, an appointment which they might accept or decline at pleasure. But as the objects of the act were benevolent, and did honor to the

humanity and justice of Congress, out of respect to the Legislature, they declared their willingness to act as Commissioners. Similar views were declared by Wilson, Blair and Peters, District Judge, and by Iredell and Sitgreaves, District Judge, all of whom addressed joint letters to the President.<sup>1</sup> Wilson, however, absolutely refused at all times to act even as a commissioner. To bring the matter to a judicial determination, the Attorney General moved, *ex officio*, for a mandamus to the Circuit Court for the District of Pennsylvania, to proceed in the case of William Hayburn, who had applied to be put on the list as an invalid pensioner. An elaborate argument was made, but because of a division in opinion as to the powers of the Attorney General the motion was denied. The ground was then shifted, and a motion made at the instance of Hayburn himself, and the merits of the case, the scope of the Act of Congress, and the refusal of the Judges to carry it into effect were fully considered. No decision was ever pronounced, as Congress at an intermediate session provided, in another way, for the relief of pensioners.<sup>2</sup>

The progress of the Supreme Court towards a position of independent power and influence was slow and difficult. "It is much to be regretted," wrote Randolph to Washington, "that the judiciary, in spite of their apparent firmness in annulling the pension law, are not what some time hence they will be,—a resource against the infractions of the Constitution on the one hand, and a steady asserter of Federal rights on the other."<sup>3</sup> He denounced the crudities of the Federal judiciary system, the jealousies of State Judges of their authority, the

<sup>1</sup> See Letters *in extenso*, Hayburn's case, 2 Dallas, 409, note (1791).

<sup>2</sup> Act 28th Feb'y, 1793. Laws of the United States, p. 305.

<sup>3</sup> Edmund Randolph to Washington, 5th Aug., 1792. Sparks's "Life and Writings of Washington," Vol. X, p. 513.

ambiguities of the Constitution, and pointed out that the most probable quarter from which alarming discontents might proceed was the rivalry between the two orders of judges. Mere superiority of talent in the Federal Judges, even if admitted, would not suffice to counterbalance the real talents and popularity of their competitors. It was possible, too, that the former might not be so far forgetful of their previous connection with the State governments as to be indifferent about the continuance of their old interests there. To these causes could be traced an abandonment of the true authority of the National Government. Besides, many severe experiments, the result of which could not be foreseen, awaited the judiciary. States were to be brought into Court as defendants to the claims of land companies and of individuals. British debts still rankled deeply, and it was feared that the precedent, fixed by the condemnation of the pension law, if not reduced to its precise principles, might justify every constable in thwarting the laws.

Another opportunity was afforded the judges of defining the independence of their position. The President, disturbed by the threatening appearance of public affairs, sought to obtain from the Chief-Justice and his Associates advice upon certain legal questions most interesting and important. Twenty-nine interrogatories, carefully framed, were submitted: Whether the principles of international law or the Treaties of the United States with France gave her or her citizens the right to fit out originally in the ports of the United States vessels of war, with or without commissions, or to refit, or re-arm, or to increase the armament; whether other powers with whom the United States were at peace could fit out such vessels or exercise similar powers; whether France had a right to erect courts within the jurisdiction of the United States



for the trial and condemnation of prizes made by armed vessels in her service; whether the principle that free bottoms made free goods, and enemy bottoms enemy goods was a part of the law of nations.<sup>1</sup> To these the Judges declined to reply, asserting with great and commendable dignity that it would be improper for them to anticipate any case which might arise, or indicate their opinion in advance of argument.

A series of exciting State trials now taxed the energies of the Judges upon Circuit. Chief-Justice Jay, in a charge delivered to the Grand Jury at Richmond, laid down the principle that by the common law, independent of any statute, the Federal Courts had power to punish offenders against the Federal sovereignty; "that the United States are in a state of neutrality relative to all the powers at war, and that it is their duty, their interest and their disposition to maintain it; that, therefore, they who commit, aid or abet hostilities against these powers, or either of them, offend against the laws of the United States, and ought to be punished."<sup>2</sup>

Two months later Genet, to check whom this doctrine had been invoked, supplied an American skipper with a French flag, who captured an English merchantman in the Delaware. Henfield, an American citizen, without casting off his allegiance, had enlisted in the service of the privateer. The English minister demanded his arrest; the French minister insisted on his discharge. Mr. Justice Wilson, in a labored, but scholastic discourse, charged the Grand Jury at Philadelphia, re-affirming the doctrine of Jay, and Henfield was indicted, and tried before Wilson, Iredell and Peters, Dis-

<sup>1</sup> Letter of Washington to Ch. J. Jay, &c., 23rd July, 1793. Sparks's "Writings of Washington," Appendix XVIII, Vol. X, pp. 359-360, 542 et seq.

<sup>2</sup> See Wharton's "State Trials of the United States," p. 49.

strict Judges. It was the joint and unanimous opinion of the Court that the acts of hostility committed by the prisoner were an offence against this country and punishable by its laws. The Jury refused to convict, while Jefferson sent the English minister a copy of the charge of the Court, as demonstrating that the Federal government had the power to punish offenders against the laws of nations. Genet gave a dinner to "Citizen Henfield," and boasted that the verdict of the Jury enabled the American people to make war upon England under the protection of the French flag.<sup>1</sup>

The common law jurisdiction of the United States in criminal cases was again asserted, and acted upon in several instances by different judges for a number of years, until abruptly denied by Judge Chase on the trial of Worrall, in 1798.<sup>2</sup> The doctrine maintained its ground, until further shaken by Judge Washington and Chief-Justice Marshall, when it was finally overthrown in *United States v. Hudson*.<sup>3</sup>

The Trials of the Western Insurgents, growing out of the Whiskey Insurrection in Pennsylvania, attracted much attention at the time, and led the President, in a speech to Congress, to call the attention of that body to the manner in which the laws of the United States had been opposed, and their execution obstructed by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the Marshal of the district.<sup>4</sup> Verdicts of guilty on several indictments of High Treason

<sup>1</sup> Wharton's "State Trials of the United States," p. 2.

<sup>2</sup> Compare trials of Henfield, Guinet, Villato, Isaac Williams and Worrall, *Ibid.*, also *U. S. v. Ravara*, 2 Dallas, 297 (1793).

<sup>3</sup> 7 Cranch, 32 (1812). See also *U. S. v. Coolidge*, 1 Wheaton, 415 (1816). *State of Penna. v. Wheeling Bridge Co.*, 13 Howard, 519 (1812).

<sup>4</sup> See Wharton's "State Trials," 102; 2 Dallas, 335 (1795). Sparks' "Writings of Washington," Vol. XII, p. 46.

were obtained, after animated discussions upon the law, and gradually law and order were restored.

Such was the general character of the duties discharged by the Judges upon Circuit.<sup>1</sup> It is now proper to turn to the cases which came before the Supreme Court.

<sup>1</sup>Mr. Hackett, Clerk of the United States Circuit Court for New Hampshire, in his interesting sketch of the Circuit Court for the New Hampshire District one hundred years ago, says:

The sessions of the courts in those days were great events in the town. Perhaps no better illustration of this fact can be had than is contained in the following taken from the "United States Oracle of the Day," a newspaper published in Portsmouth. In the paper of May 24, 1800, appears this, almost the only local item, which may be regarded as a first-rate notice:

"Circuit Court. On Monday last the Circuit Court of the United States was opened in this town. The Hon. Judge Paterson presided. After the jury were empanelled the Judge delivered a most elegant and appropriate charge. The *Law* was laid down in a masterly manner: *Politics* were set in their true light by holding up the Jacobins as the disorganizers of our happy country, and the only instruments of introducing discontent and dissatisfaction among the well-meaning part of the Community. *Religion* and *Morality* were pleasingly inculcated and enforced as being necessary to good government, good order and good laws; for 'when the righteous are in authority the people rejoice.'

"We are sorry we could not prevail upon the Honourable Judge to furnish a copy of said charge to adorn the pages of the United States Oracle.

"After the charge was delivered, the Rev. Mr. Alden addressed the Throne of Grace in an excellent and well-adapted prayer."

It may well be supposed that the Judge who was Associate Justice William Paterson, of New Jersey, could hardly afford to concede the request of the New Hampshire editor, as doubtless the charge might be needed to be thereafter given in other districts by the learned judge, who probably spent more time in its preparation than was commonly required for matter which adorned the pages of Portsmouth papers nearly a hundred years ago.—*Green Bag*, Vol. II., No. 6, 264.

## CHAPTER XII.

THE FIRST EPOCH: 1790-1801: EARLY DECISIONS UPON CONSTITUTIONAL QUESTIONS:  
 ADMIRALTY CAUSES: MATTERS OF PRACTICE: CHANGES UPON THE BENCH:  
 SKETCHES OF PATERSON, ELLSWORTH, CHASE, WASHINGTON, MOORE: CHANGES  
 IN THE CHIEF JUSTICESHIP: INSTANCES OF POLITICO JUDICIALISM: JUDICIAL  
 PLURALISTS: ESTIMATE OF THE SERVICES OF THE OLD SUPREME COURT.

THE first cause of note was that of the *State of Georgia v. Brailsford and others*. In 1782, by an Act of Confiscation, a bond which had been given, in 1774, by Kelsall and Spalding to Brailsford and others, alleged aliens, had been sequestered to the State of Georgia. Brailsford and his copartners had brought suit on the bond in 1791, in the United States Circuit Court for the District of Georgia. The State had unsuccessfully applied for permission to assert her claim, and judgment had been entered for the plaintiffs. The State now filed her bill in Equity in the Supreme Court for an injunction to stay proceedings in the lower Court, and praying that the Marshal should be directed to pay over the moneys in his hands to the treasurer of the State.

Some difference of opinion was expressed as to whether the State had or had not an adequate remedy at law, and the Court, Johnson and Cushing dissenting, granted the injunction, so as to retain the money in the custody of the law until it should be adjudged to whom it belonged.<sup>1</sup>

<sup>1</sup> 2 Dallas, 402 (1792). It is remarkable that the very first opinion published in the reports of the decisions of the Supreme Court is a *dissenting* opinion, that of Mr. Justice Johnson.

A motion was subsequently made to dissolve the injunction and dismiss the bill, but it was allowed to stand until the next term, when the right of the State to the bond was tried by a special jury, upon an amicable issue, before the Supreme Court.<sup>1</sup> After argument the Chief Justice charged the jury that it was the unanimous opinion of the Court that the Act of Georgia did not vest the debt in the State at the time of passing it; that it was subjected, not to confiscation, but only to sequestration, and the owner's right to recover it revived after the peace.

This decision, although not elaborately expressed, involved the important principle that the Treaty of Peace, like the Constitution, was in respect to matters embraced by its terms, the supreme law, and could not be restricted in its operation by State action or State laws. The same result was reached, and the same conclusion justified after the most exhaustive examination in the far more celebrated case of *Ware v. Hylton*,<sup>2</sup> in which the splendid eloquence of Patrick Henry, the great

<sup>1</sup> 3 Dallas, 1 (1794). It has been asserted that this case is the only instance of trial by jury in the Supreme Court. This is an error. The Minutes of the Court disclose that in the case of *Oswald v. The State of New York*, a jury was sworn and witnesses called, and a verdict found for the plaintiff of \$5,315.06. This was in February, 1795. Two years and a-half later a writ of inquiry of damages in the case of *Catlin v. The State of South Carolina*, was executed at the bar of the Supreme Court, and a verdict was given for the plaintiff for \$55,002.84. Although judgments were entered, there is no record of any steps to enforce them. In *Grayson v. The State of Virginia*, a distringas was granted to compel the State to appear, but this process was abandoned and an alias subpoena issued, upon the establishment of a general rule by which it was provided that when process at common law or equity shall issue against a State, the same shall be served on the Governor and Attorney-General, and that if process in equity by subpoena should be served sixty days before return day, and the defendant State should not appear, the plaintiff should proceed *ex parte*. Minutes. See also *Grayson v. Virginia*, 3 Dallas, 320 (1796).

<sup>2</sup> 3 Dallas, 199 (1796).

reasoning faculties of John Marshall at the bar, and the powerful dissenting opinion of Iredell were employed in vain to convince the Court that Congress had no power to make a treaty that could operate to annul a legislative act of any of the States, and thus destroy rights acquired under such an act. Chase, Paterson, Wilson and Cushing, impressed by the uncommon magnitude of the subject, the bitter and exciting controversies it had provoked, and the far-reaching consequences by which their decision would be attended, although differing upon some matters of detail and in the mode of their reasoning, reached the conclusion that the Treaty of 1783 was the supreme law, equal in its effect to the Constitution itself, in overruling all State laws upon the subject, and the words that British creditors should "meet with no lawful impediment" were as strong as the wit of man could devise to avoid all effects of sequestration, confiscation, or any other obstacle thrown in the way by any law, particularly pointed against the recovery of such debts. The decision expanded from a statement of the contractual liability of an individual to an assertion that the treaty obligations of the nation were paramount to the laws of individual States. Happy conclusion! A contrary result would have blackened our character, at the very outset of our career as a nation, with the guilt of treachery to the terms of the treaty by which our Independence had been recognized, and would have prostrated the national sovereignty at the feet of Virginia.

A case now came before the Court which excited an unusual degree of attention, both on account of the novelty of the questions raised and the important political consequences involved in the decision. Chisholm, a citizen of South Carolina, had brought an action in the Supreme Court against the State of Georgia, by service of process upon the Governor and

Attorney-General of that State. Georgia refused to appear, and the Attorney-General of the United States moved that unless Georgia caused her appearance to be entered by the next term, judgment should be entered against her by default and a writ of inquiry issue. Georgia refused to recognize the jurisdiction, although it had been acquiesced in in similar suits by New York, Maryland, South Carolina and Virginia, and presented, through Dallas and Ingersoll of Pennsylvania, a written remonstrance and protestation, declining to appear, even upon argument.<sup>1</sup>

The reasoning of Randolph, upon whom the burden fell of breaking his way without assistance into a subject full of difficulty and replete with danger, is profound and masterly. Fully conscious of the unpopularity of his motion and of the condemnation of his native State, he refused to commit an act of official perfidy by surrendering his own convictions of duty when brought face to face with a question of Constitutional right.

His contention embraced four propositions: that a State could be made a party defendant, in any case, in the Supreme Court, at the suit of a private citizen of another State; that an action of assumpsit could be maintained against a State; that service by summons upon the Governor and Attorney General of a State was a competent service; that an appearance could be enforced by process. All of these were distinctly sustained by the Court, with the exception of the latter, which for the time being was passed from motives of prudence and delicacy, but it was ordered that unless the State appeared, or showed cause to the contrary, by the next term, judgment by default should be entered.

<sup>1</sup>Chisholm Exrs. v. Georgia, 2 Dallas, 419 (1793).

Justice Blair planted himself upon the express letter of the Constitution, which extended the jurisdiction of the Court in express terms "to controversies between a State and citizens of another State."

"Is then," he asks, "the case before us one of that description? Undoubtedly it is, unless it may be a sufficient denial to say, that it is a controversy between a citizen of one State and another State. Can this change of order be an essential change in the thing intended? And is this alone a sufficient ground from which to conclude that the jurisdiction of this Court reaches the case where a State is plaintiff, but not where it is defendant? In this latter case, should any man be asked, whether it was not a controversy between a State and a citizen of another State, must not the answer be in the affirmative? A dispute between A and B is surely a dispute between B and A."

After showing that the Constitution describes generally the judicial powers of the United States, he points out that it then proceeds to speak of them distributively, and gives to the Supreme Court original jurisdiction, among other instances, in the case where a State shall be a party. He then asks:

"But is not a State a party as well in the condition of a defendant as in that of plaintiff? And is the whole force of that expression satisfied by confining its meaning to the case of a plaintiff State? It seems to me that if this Court should refuse to hold jurisdiction of a case where a State is defendant, it would renounce part of the authority conferred, and consequently part of the duty imposed on it by the Constitution."

Upon the question of sovereignty, he said:

"But we are not now in a State Court; and if sovereignty be an exemption from suit in any other than the sovereign's own Courts, it follows that when a State, by adopting the Constitution has agreed to be amenable to the judicial power of the United States, she has, in that respect, given up her right of sovereignty."



The question, said Wilson, "may, perhaps, be ultimately resolved into one, no less radical than this—'Do the people of the United States form a nation?'" Applying the touchstones of the principles of general jurisprudence; the laws and practice of States and Kingdoms, and the direct and explicit declaration of the Constitution itself, he declared that from all the combined inference was that the action would lie.

Cushing put the matter concisely:

"With respect to controversies between a State and citizens of another State, comparing all the clauses together, the remedy is reciprocal; the claim to justice equal. As controversies between State and State, and between a State and citizens of another State, might tend gradually to involve States in war and bloodshed, a disinterested civil tribunal was intended to be instituted to decide such controversies, and preserve peace and friendship; if a State is entitled to justice in the Federal Court against a citizen of another State, why not such citizen against the State, when the same language equally comprehends both? The rights of individuals and the justice due to them are as dear and precious as those of States. Indeed the latter are founded upon the former; and the great end and object of them must be to secure and support the rights of individuals, or else vain is government."

The opinion of Chief Justice Jay is the most elaborate of his judicial utterances. He pointed to the language of the Preamble of the Constitution, and to the history of the country preceding its formation, to emphasize his assertion that the sovereignty of the nation was in the people of the nation, who were "sovereigns without subjects," and that a vast distinction existed between such a condition and the sovereignty of European potentates, whose dignities, pre-eminences, and powers were personal but not official. In a country where all citizens were equal, it was agreed that one free citizen could sue another citizen or any number of citizens; nay, in certain

cases one citizen might sue forty thousand; for where a corporation is sued, all the members of it are actually though not personally sued. He saw no distinction as to right between the forty thousand inhabitants of Philadelphia, associated under a charter, and the fifty thousand citizens of Delaware associated under a State government. The service of a summons on a Governor and Attorney General of a State was as easy and convenient to the public and parties, as on the Mayor or other officers of the corporation of a city. All were officers of the people, and however more exalted a Governor might be than a Mayor, yet, in the opinion of those who disliked aristocracy, that circumstance could not be a good reason for impeding justice. He saw no incompatibility between suability and State sovereignty, and declared that as one State might sue another State in the Supreme Court, it was "plain that no degradation to a State was thought to accompany her appearance in this Court." He then showed that Georgia by becoming a party to the national compact had consented to be suable by individual citizens of another State, and argued that if there was "a controversy" between them it clearly fell not only within the spirit but the very words of the Constitution. He insisted that the Constitution had established a new order of rights and duties, and finally, lest his conclusions might reach too far, pointed out that there was a distinction between suits against a State and suits against the United States, because in the former the national Courts were supported in all their legal and Constitutional proceedings and judgments by the arm of the National Executive, but in the latter there was no power which the Courts could call to their aid.

From these views Iredell, alone, dissented, in an opinion of which it has been truly declared that it enunciates either directly or by implication all the leading principles of what

has since become known as State Rights Doctrine, and which as a mere legal argument was far superior in closeness of reasoning to Wilson's or Jay's. He confined himself strictly to the question before the Court, whether an action of assumpsit would lie against a State, and showed by numerous illustrations that though in England certain judicial proceedings by way of petition, not inconsistent with sovereignty, might take place against the Crown, yet an action of assumpsit would not lie. Yet surely the King could assume as well as a State. If such an action could be maintained, it must be in virtue of the Constitution of the United States, or of some law of Congress conformable thereto. After closely examining the grant of judicial power, and the distribution of jurisdiction as stated in the Judiciary Act, he failed to find any delegation of authority in such a case. He challenged the construction of the Attorney General that the Supreme Court could exercise all the judicial power vested by the Constitution, by its own authority, whether the Legislature had prescribed methods of doing so or not. The Constitution was not self-enforcing; the Article could not be effectuated without legislative intervention. All the Courts of the United States must receive not merely their organization, but all their authority as to the mode of their proceeding from the Legislature only. There was no part of the Constitution that authorized the Supreme Court to take up any business where Congress had left it, and, in order to give full activity to the powers given by the Constitution, supply legislative omissions by making new laws for new cases, or by applying old principles to new cases materially different from those to which they had been previously applied. The States had not surrendered their sovereignties to the Union in this respect, and at the time of the adoption of the Constitution there was not

in any State any particular legislative mode authorizing a compulsory suit for the recovery of money against a State. No new remedy having been provided, the case must be governed by the principles of pre-existing law, and a long train of precedents showed that no such action could be maintained. No debt could be due from a State, except in case of a contract with the Legislature itself, or with the Executive in pursuance of express authority, from the Legislature, or in case of a contract with the Executive without any special authority. Every man knew that he could not sue the Legislature, nor could he sue a Governor, unless the Legislature had made such a provision, and in the third case, as a Governor was possessed simply of Executive powers he could not make a contract unless specially authorized. The arguments as to corporations did not apply. Corporations were the mere creatures of sovereignty, but States were sovereigns themselves; they did not owe their origin to the Government of the United States, but were in existence before it. No fair construction of the Constitution could show that they had abdicated in favor of the General Government in such a case as this.

It is somewhat singular that no one of the Judges alluded to the views expressed by eminent public men at the time the Constitution was before the people for ratification. The authors of "The Federalist" had declared that such a jurisdiction was without "a color of foundation." John Marshall had declared in the Virginia Convention: "I hope that no gentleman will think that a State will be called at the bar of the Federal Courts. . . . It is not rational to suppose that the sovereign power shall be dragged before a Court."

The decision as soon as pronounced created much excitement and fanned anti-federal sentiment into a flame. Every

State was burdened with heavy debts. Several had been sued, and the Legislature of Georgia responded by a statute denouncing the penalty of death against any one who should presume to enforce any process upon the judgment within its jurisdiction. The decision was pronounced on the 18th of February, 1793; two days afterwards the Eleventh Amendment to the Constitution was proposed to Congress, and formally acted upon by that body in the following December. It was not declared adopted by the several States until January 8th, 1798. In the meantime the Court refused to bend to the popular fury, and after a year rendered judgment by default, and ordered an inquiry of damages.<sup>1</sup> The plaintiff, however, prudently awaited action upon the proposed amendment, and on the 4th of February, 1798, the case of *Hollingsworth v. The State of Virginia*<sup>2</sup> being before the Court, it was declared that in view of the amendment, jurisdiction was renounced "in any case past or future, in which a State was sued by the citizens of another State, or by citizens or subjects of any foreign State."<sup>3</sup>

The importance of the decision, however, remained. It was the first clear trumpet-note which had been sounded by the new nation, in striking contrast with the feeble wail against State power uttered by the Committee of the Continental Congress when dealing judicially with *Olmstead's Appeal* in the case of the sloop *Active*. As Judge Cooley has

<sup>1</sup> Minutes of the Supreme Court, February 14, 1794.

<sup>2</sup> 3 Dallas, 378 (1798).

<sup>3</sup> See *Hollingsworth v. Virginia*, 3 Dallas, 378-382 (1798). Minutes of the Supreme Court. Schouler's "History of the United States," Vol. II, p. 274. Pitkin's "History of the United States," Vol. II, pp. 335, 341. Van Santvoord's "Lives of the Chief Justices of the United States," pp. 51, 54. McRee's "Life of Iredell," Vol. II, p. 380. Cooley in "Constitutional History of the United States as Seen in the Development of American Law," pp. 47-71.

remarked, the Union could scarcely have had a valuable existence had it been judicially determined that powers of sovereignty were exclusively in the States or in the people of the States severally.<sup>1</sup> The doctrine of an indissoluble Union, though not in terms declared, was in its elements contained in this decision, which proved of priceless value in determining at the very outset of our national career the true character of our government.

In *Hylton v. The United States*<sup>2</sup> the power of Congress to lay taxes was exhaustively considered, and the principle established that two rules must be observed: first, that of uniformity, whenever imposts, excises or duties were laid; and second, that of apportionment according to the census, whenever the tax was direct. It was held that no tax could be direct unless capable of apportionment, and it was demonstrated by an unanswerable course of reasoning that a tax upon carriages could not be a direct tax, because apportionment would lead to the grossest and most arbitrary differences in the rate in each State. Mr. Justice Chase inclined to the opinion that the direct taxes contemplated by the Constitution were only two, a capitation or poll tax simply, without regard to property, profession, or any other circumstances, and a tax on land. He showed that a tax on carriages was a species of duty—a generic term, almost as comprehensive as the word tax, which could not be confined to taxes on importations only. Although he did not think it necessary at that time to decide whether the Supreme Court possessed the power, under the Constitution, to declare an Act of Congress void, because of a conflict with the Constitution, yet he declared

<sup>1</sup> Cooley in "Constitutional History of the United States as seen in the Development of American Law," p. 49.

<sup>2</sup> 3 Dallas, 171 (1796).

that if the Court did have such power he would never exercise it except in a very clear case.

In *Calder v. Bull*,<sup>1</sup> although the point actually decided was that the clause in the Constitution prohibiting the States to pass *ex post facto* laws related only to penal and criminal proceedings, and that therefore a retrospective law of a State, affecting property rights only, and violating no contract, was valid, yet two principles of great value in the maintenance of the rights of the States were enlarged upon; that the validity of State legislation was at all times to be presumed, and second: that where no Federal question arose, the proper authority for determining the validity of State legislation was the State judiciary. Chase declared himself "fully satisfied" that the Supreme Court had no jurisdiction to declare void a State law contrary to the Constitution of such State, and again carefully avoided the question whether it could declare void an Act of Congress contrary to the Federal Constitution. Iredell, however, while asserting that Acts of Congress or of the Legislature, violative of Constitutional provisions, were unquestionably void, admitted that as the authority to declare them void was "of a delicate and awful" nature, the Court would never resort to that authority but in a clear and urgent case.

Some years later, in *Cooper v. Telfair*,<sup>2</sup> where an act of banishment and confiscation of property was held to be not repugnant to the Constitution of Georgia, although it was admitted that a general opinion existed at the bar, and had been expressed by some of the judges upon Circuit<sup>3</sup> that an Act of Congress in opposition to the Constitution is void, yet, in the absence of a decision of the Supreme Court itself, it was

<sup>1</sup> 3 Dallas, 386 (1798).

<sup>2</sup> 4 Dallas, 14 (1800).

<sup>3</sup> See remarks of Paterson, J., in *Van Horn v. Dorrance*, 2 Dallas, 304 (1795).

said to be still an open question where the power resided to declare it void.

Thus, it was, with slow, timid and halting footsteps that the Supreme Court approached the doctrine of *Marbury v. Madison*.

In the meantime the Constitutional adoption of the Eleventh Amendment was judicially declared in *Hollingsworth v. Virginia*,<sup>1</sup> while in *Fowler v. Lindsey*<sup>2</sup> the distinction was drawn between a case in which a State was a party, and where the interests of a State might be indirectly affected by the decision in a suit relating to land between individuals claiming under a State grant, Judge Washington stating it as "a safe rule" that a case which belongs to the jurisdiction of the Supreme Court, on account of the interest that a State has in the controversy, must be one in which a State is either nominally or substantially a party to the record.

During the same period several important cases affecting the admiralty jurisdiction of the Federal Courts were determined. Of these the most important and instructive, as containing an expression of the growth of the federal idea, was that of *Penhallow v. Doane*,<sup>3</sup> in which the power of the old Federal Court of Appeals in cases of Capture, instituted by the Continental Congress under the Articles of Confederation was sustained, and its jurisdiction declared to be final and conclusive.

In *Glass v. The Sloop Betsey*,<sup>4</sup> although it was argued with much ingenuity and learning that the District Courts of the United States had no jurisdiction over questions of prize, yet it was held that they possessed all the powers of Courts of Admiralty, both upon the instance and prize sides and could

<sup>1</sup> 3 Dallas, 378 (1798).

<sup>2</sup> *Ibid.*, 411 (1799).

<sup>3</sup> *Ibid.*, 54 (1795).

<sup>4</sup> *Ibid.*, 6 (1794).



decree restitution of a vessel belonging to a neutral, captured as British property by a French privateer and brought to a port of the United States by the captor. In the same case, it was asserted with great dignity that no foreign power could institute a Court of judicature of any kind within the jurisdiction of the United States except by treaty, and that the admiralty jurisdiction exercised by consuls of France in the United States was unwarranted. Due care, however, was exercised not to overstep the bounds prescribed by international law, and later, in the case of a capture of a vessel belonging to a citizen of the United States by a French privateer, which had been carried *infra præsidia* of the captors, the principle was sustained that all such questions belonged exclusively to the tribunals of the belligerent power, and that no vessel of war of such belligerent or the officers thereof could be seized or arrested within the United States, at the suit of individuals to answer for such capture. A writ of prohibition was accordingly issued, restraining a District Court from proceedings of a retaliatory nature.<sup>1</sup>

In *Talbot v. Jansen*,<sup>2</sup> the only case in the decision of which Rutledge participated as Chief-Justice, the important question of the right of expatriation was raised, but not determined, although one or two of the judges inclined, extra-judicially, to the view that a citizen did not possess the right of voluntary expatriation without the permission of his own government.

In *United States v. Judge Lawrence*,<sup>3</sup> upon an application for a mandamus directing him to issue a warrant of arrest, it was held that the Court had no power to compel a judge to decide according to the dictates of any Judgment but his own.

<sup>1</sup> *United States v. Richard Peters*, District Judge, 3 Dallas, 121 (1795).

<sup>2</sup> 3 Dallas, 133 (1795).

<sup>3</sup> *Ibid.*, 42 (1795).

Several important matters of practice were determined. The Attorney-General having asked for information relative to the system by which proceedings should be regulated, it was ordered that the practice of the Courts of King's Bench and Chancery in England afforded outlines for the practice of this Court.<sup>1</sup> The bar was also notified that the Court expected to be furnished with a statement of the material points of a case.<sup>2</sup> All evidence on motions for the discharge of prisoners on bail must be by way of deposition, and not *viva voce*.<sup>3</sup> The statements of facts required by Act of Congress of the Circuit Courts as the basis of their judgments in any Equity or Admiralty cause were held to be conclusive.<sup>4</sup> In suits against States, whether at common law or in equity, it was ordered that service should be made of process upon the Governor and the Attorney-General, and that the process of subpœna, when resorted to, should be served sixty days before return day, and on a failure of the State to appear, the complainant might proceed *ex parte*.<sup>5</sup>

Two questions of jurisdiction were also settled: To sustain the Federal jurisdiction, the record must show that the parties were citizens of different States;<sup>6</sup> the amount demanded by the plaintiff, and not the sum found to be due, was the test of jurisdiction even upon proceedings in error.<sup>7</sup>

During the period of the decisions which have been reviewed changes took place in the composition of the bench which it is now proper to notice. The Court, as originally

<sup>1</sup> Minutes of the Supreme Court.

<sup>2</sup> *Ibid.*

<sup>3</sup> U. S. v. Hamilton, 3 Dallas, 17-120 (1795).

<sup>4</sup> Wiscart v. Dauchy, 3 Dallas, 321 (1796).

<sup>5</sup> Grayson v. The State of Virginia, 3 Dallas, 320 (1796).

<sup>6</sup> Bingham v. Cabbot, 3 Dallas, 19 (1795). S. C., *Ibid.* 382 (1798). Turner, Admr. v. Enrille, 4 Dallas, 7 (1799). Turner v. Bank, 4 Dallas, 8 (1799).

<sup>7</sup> Wilson v. Daniel, 3 Dallas, 401 (1798).





Wm. Scherzer

constituted, consisted of Jay as Chief-Justice, and Rutledge, Cushing, Harrison, Wilson and Blair as Associates. Harrison had declined, and Iredell had taken his place. Rutledge had resigned after a few months of service on the Circuit, and Thomas Johnson had succeeded him. Johnson resigned at the end of eighteen months, with no trace of his judicial work except a short dissenting opinion in *Georgia v. Brailsford*, and on the 4th of March, 1793, William Paterson was commissioned. His father was an Irish immigrant to New Jersey in 1749, and, according to some accounts, the son was born in Ireland; according to others, at sea on the passage to America. He was educated at Princeton, and graduated September 27, 1763. He read law with Richard Stockton, one of the Signers of the Declaration of Independence; was admitted to the bar within a year, and became an attorney of the Supreme Court in 1769. He took an active part in public affairs, always on the patriotic side, and was a member of the First Provincial Congress of New Jersey, serving as Assistant Secretary. In 1775 he became a member of the Continental Congress, and during the following year was the Attorney-General of the State and a member of the Legislative Council. He was several times re-elected to Congress, but resigned all his public positions in 1783 to resume the practice of the law. He was a member of the Annapolis and the Federal Conventions, and in the latter offered the plan so well known as the New Jersey Plan, by which it was proposed to preserve the State sovereignties, while giving to the General Government power to provide for the common defence and general welfare. He contended that the proper object of the Convention was a mere revision and extension of the Articles of Confederation. He insisted on an equal vote of the States in the Senate, and objected to a propor-

tional representation in either House. After the adoption of the Constitution, Mr. Paterson was chosen one of the Senators of the United States from New Jersey, his colleague being Jonathan Elmer. He was one of the tellers to count the electoral votes, and chairman of the committee to prepare the certificates of the election and to certify the elected officers. He served as a member of the Judiciary Committee, and, next to Ellsworth, took the most active share of the work of framing the Judiciary Act. On the death of Governor Livingston, in 1790, he became the Governor and Chancellor of his State, resigning his position as United States Senator, and held the former office for three years. During this time he executed, under the authority of the Legislature, the work of collecting and reducing into proper form all the Statutes of Great Britain which before the Revolution were held to be in force, and which, by the Constitution, were extended to the State, as well as all the public acts which had been passed since,—a work which has been spoken of by a competent authority as a system of statute law more perfect than that of any other State, and which has continued to this day to deserve the highest praise. Such had been the public services of the man whom Washington now raised to the Supreme Bench.

In 1795 John Jay, who had been sent during the previous year as special envoy to Great Britain, was elected Governor of New York and resigned the Chief Justiceship. Thereupon the President, notwithstanding the opposition of his cabinet, whose hostility had been excited by an intemperate attack by Rutledge upon Jay's treaty, sent a commission during the recess to John Rutledge, who presided over the Court during the August term. His name came before the Senate on the 10th of December, 1795, and on the 15th was rejected, the real reason





*Phil. Ellsworth*



being that the mind of this illustrious patriot had become seriously impaired. William Cushing, the Senior Associate Justice, was commissioned as Chief Justice on the 27th of January, 1796, but declined, preferring to retain his former position.

Oliver Ellsworth, at that time a Senator of the United States, was then named, and commissioned on the 4th of March, 1796; a man of kingly dignity, exalted conscience, immutability of will, but slow and ponderous intellect. His name will always rank among the most distinguished statesmen and jurists of America. He was born at Windsor, Conn., on the 29th of April, 1745. He received a classical education, and graduated from Princeton in 1766. He then read law, but was not admitted to the bar until 1771. His integrity, industry, knowledge of law, careful preparation of his cases, and earnest logic, occasionally warming into eloquence, soon won for him a commanding position among his professional brethren. He rose almost at once to political distinction, and took an active part in support of the colonies in resisting the oppression of Great Britain. In 1777 he was elected a delegate to the Continental Congress, and became a leading member, serving upon important committees, conspicuous for his talents as a debater. In 1784 he was appointed a judge of the Superior Court of Connecticut. While still upon the Bench, in 1787, he was chosen a member of the Federal Convention, and exerted a powerful influence in securing substantial recognition of the State governments, which service has linked his name with that of Paterson of New Jersey, as one of the authors of our Federal system. He objected to the word "national," and preferred the title of "The United States," declaring that he wished the plan of the Convention to go forth as an amendment of the Articles of Confederation, since, under this idea, the authority of the

legislatures could ratify it. He did not like popular conventions, as they were better fitted to pull down than build up Constitutions. He wished the agency of the States maintained, and urged a compromise between the large and small States as to their vote in Congress. He contended for an Executive Council, and approved of a council of revision of acts of Congress, to be composed of the President and the Judges. For some reason he was absent from the Convention on the last day, and his name does not appear upon the consecrated roll of the Signers of the Constitution. But in his own State convention, and ever afterwards, he was among the most earnest and zealous supporters of the new Government. Having attached himself to the Federal party, he was elected by the legislature of his native State to the Senate of the United States, in which he gained great renown as a debater, and as a pillar of Washington's administration. His most important work was the establishment of the Federal Judiciary system. In fact, it is asserted by some that he was the sole author of the famous Judiciary Act of 1789. "That great Act," said Mr. Justice Field, "was penned by Oliver Ellsworth, a member of the Convention which framed the Constitution, and one of the early Chief Justices of this Court. It may be said to reflect the views of the founders of the Republic as to the proper relations between the Federal and State courts."<sup>1</sup> "He was born," says Dr. Dwight, "to be a great man." In one of his Senatorial speeches, Daniel Webster referred to him as "a gentleman who has left behind him, on the records of the government of his country, proofs of the clearest intelligence, and of the utmost purity and integrity of character," while a recent biographer

<sup>1</sup> *Ex parte* Virginia, 100 U. S., 313-339 (1879).





Samuel Clemens

has declared that "for strength of reason, for sagacity, wisdom and sound, good sense in the conduct of affairs; for moderation of temper and general ability, it may be doubted if New England has yet produced his superior."

The next change occurred through the resignation of John Blair, his successor being Samuel Chase, a native of Maryland, who was commissioned on the 27th of January, 1796. He was born in Somerset County, on the 17th of April, 1741, and was the son of an Episcopal clergyman, by whom he was carefully educated. Devoting himself to the study of the law, he was admitted to the Bar of Annapolis in 1761, where his remarkable personal traits soon brought him distinction. His abilities were of the highest order; industry, intrepidity, intense convictions, energetic eloquence, added to a sonorous voice and imposing stature, made him conspicuous as a leader in the Colonial Legislature, where he became known as "the Maryland Demosthenes." He vehemently denounced the Stamp Act, and a few years afterwards served as a member of the Committee of Correspondence and as a delegate to Congress, retaining his position until 1779. His terrible arraignment of Zubly, of Georgia, whom he stigmatized as a Judas, compelled that traitor to flee from Congress, whose secrets he was divulging to the enemy. In 1776, with Franklin and Carroll, he endeavored, as Commissioner, to form a plan of Union between the Colonies and Canada, and on his return labored zealously and successfully to change the sentiments of Maryland so as to authorize him to vote for the Declaration of Independence, of which he became one of the Signers. Throughout the long and dark years of the war his exertions were untiring, and his spirit courageous and alert. In 1783 he interested himself in securing for his State a large sum of money which had been intrusted to the Bank

of England prior to the Revolution. In his State Convention he was in favor of the ratification of the Constitution, although many of its provisions he did not regard as sufficiently clear. In 1791 he became the Chief Justice of the General Court of Maryland, a position which he held at the time of his appointment to the Supreme Court of the United States. Irascible, vain, overbearing and sometimes tyrannical, but learned, able, patriotic and of spotless honor, with an instinct for tumult, and a faculty for promoting insurrection at the bar, "moving perpetually with a mob at his heels," a suite from which, as Dr. Wharton writes, even the judicial office could not separate him; he trusted with general success to his fearlessness to extricate himself from the disorders which his imprudence fomented. Averse to the assumption of jurisdiction, yet harsh in the manner of exercising that which he had, with a quick perception of the spirit of the Constitution, and an intellect conspicuous for its clearness, he presents, as an American Thurlow, one of the most singular yet striking figures in our judicial history. He was the only member of the Supreme Court who was ever impeached for judicial misconduct, but was triumphantly acquitted.

The appointment of Bushrod Washington, of Virginia, was occasioned by the death of James Wilson, at the house of his colleague Iredell, where he succumbed, at the comparatively early age of fifty-six, to the misfortunes attending unhappy speculation in land, the dishonesty of an agent and the mortification of imprisonment for debt. Washington was commissioned on the 29th of September, in the recess, and re-commissioned on confirmation, December 20th, 1798. His father was John A. Washington, a younger brother of General Washington, of whom the son was a favorite nephew. His education was received from a tutor at the house of Richard



Buck. Washington





Henry Lee, and subsequently at the College of William and Mary. During the invasion of Virginia by Cornwallis he joined a volunteer troop of horse, and served in the army under the command of Lafayette. In 1781 he came to Philadelphia, bearing a letter from George Washington to James Wilson, who had been selected as his legal preceptor, and pursued his studies with diligence and success. Returning to his native State, he practiced law with close attention to details and slowly rose to prominence. In 1787 he became a member of the House of Delegates, and in the following year stood beside Madison and Marshall in their advocacy of the Constitution of the United States in the State Convention. Removing to Alexandria, and subsequently to Richmond, he continued his practice, reporting, in two volumes, the decisions of the State Supreme Court. Of solid rather than brilliant mind, sagacious and searching, rather than quick or eager, of temperate yet firm disposition, simple and reserved in his manner, laborious in research, clear in statement, learned in discussion, accurate in reasoning, with the love of justice as his ruling passion, "fearless, dignified and enlightened," he found himself at the early age of thirty-six years called upon by President Adams to fill an office which during a long judicial life he adorned by labor, learning and wisdom.

The death of Iredell in October, 1799, occasioned another vacancy, which was filled by the appointment of Alfred Moore, whose commission was dated December 10, 1799. His birthplace was near Wilmington, North Carolina, and the day of his birth was the 21st of May, 1755. His ancestors were among the most distinguished of the early settlers of the Province, his father, Maurice Moore, being one of the three colonial judges holding office at the outbreak of the Revolution. In 1764 young Moore was sent to Boston, where he

became a student at Harvard and attracted attention by his quick wit and agreeable manners. During his absence he became interested in military matters through the friendship of a British officer, who sought in vain to induce him to enter the royal service. Upon his return home, in 1774, he read law under the direction of his father, and was admitted to the bar in the following year. He soon exchanged the labors of the forum for the toils and dangers of war, participating in the defence of Fort Moultrie in Charleston Harbor, and subsequently organizing a partisan corps with which he so effectually worried the enemy that they singled him out for vengeance and plundered his plantation, carrying off his slaves and burning his residence. In 1782 he became the Attorney-General of the State, and for nine years labored with such assiduity as to achieve a reputation rarely equalled by any prosecuting officer. In 1798 he was appointed a Judge of the Superior Court, delivering opinions which have been spoken of in terms of praise by his successors. From this office he was promoted to the Supreme Court of the United States, but owing to the practice which prevailed after Marshall ascended the bench of making the Chief Justice the organ of the Court, delivered but one short opinion in the case of *Bass v. Tingy*.<sup>1</sup> He had a keen sense of humor, a brilliant wit, and an overpowering logic. His style as an advocate was lucid and direct, terse and compact. He was small in stature, neat in dress, graceful in manners; his voice was clear and sonorous, his perceptions quick and his judgment almost intuitive; his manner of speaking was animated. He had chosen Swift for his model, and his language was always plain. An eminent authority has declared that he is certainly to be ranked

<sup>1</sup> 4 Dallas, 37 (1800).



Edmund West Rosenthal Ph. Jr. 1889

*A. Moore*



among the first advocates whom the American nation has produced. In politics he was a Federalist, and in 1795 had been nominated for the United States Senate, but was defeated by a single vote. A county in his native State preserves his memory and his name.<sup>1</sup>

For the fourth time a change was made in the head of the Court. In October, 1799, Ellsworth had been commissioned one of the three Envoys Extraordinary and Ministers Plenipotentiary to France, and resigned the office of Chief Justice from Paris, in November, 1800. Without prior notice to him, Jay was a second time nominated and confirmed, his commission being dated December 19th. "I had no permission from you," wrote President Adams, "to take this step, but it appeared to me that Providence had thrown in my way an opportunity, not only of marking to the public the spot where, in my opinion, the greatest mass of worth remained collected in one individual, but of furnishing my country with the best security afforded its inhabitants against its increasing dissolution of morals."<sup>2</sup> "I left the Bench," replied Jay, "perfectly convinced that under a system so defective it would not obtain the energy, weight and dignity which was essential to its affording due support to the national government; nor acquire the public confidence and respect which, as the last resort of the justice of the nation, it should possess. Hence I am induced to doubt both the propriety and expediency of my returning to the Bench under the present system. . . . Independently of these considerations, the state of my health removes every doubt."<sup>3</sup>

<sup>1</sup> For the materials of this sketch, I am indebted to the Hon. A. M. Waddell, of Wilmington, N. C.

<sup>2</sup> John Adams to Jay, December 19, 1800, William Jay's "Life of John Jay," Vol. II, p. 421.

<sup>3</sup> To President Adams, January 2, 1801, Jay MSS. Pellew's "Life of Jay," p. 338.

That such an estimate of the Supreme Court and such a despairing prophecy should be uttered by such a man as John Jay would occasion much surprise, were it not a fact that one of the vices of the day was the frequent desertion by the judiciary of its own exalted functions for other branches of the service. Doubt and uncertainty as to its true position clouded its earlier years, "when the politicians—or statesmen—of that day bivouacked in the chief justiceship on their march from one political position to another."<sup>1</sup> They were judicial pluralists as well. Jay himself held at the same time the offices of Chief Justice and Secretary of State for nearly six months; and afterwards, while retaining the Chief Justiceship, did not scruple to undertake the mission to England, which caused his absence from the bench for more than a year, and when at last he resigned, he did so, not because he thought the two offices incompatible, but because he had been elected to a third, that of Governor of New York.<sup>2</sup> Ellsworth, while Minister Plenipotentiary to France, retained the Chief Justiceship and resigned only on the ground of ill-health, and even Marshall, who was commissioned as Chief Justice on January 31, 1801, and presided during the February Term of the Supreme Court, retained his place as Secretary of State until the incoming of Jefferson's administration, discharging in the mean time the duties of the two offices concurrently, on the same day issuing reports in the one capacity, and listening to arguments in the other.<sup>3</sup>

<sup>1</sup> John M. Shirley, "The Dartmouth College Causes and the Supreme Court of the United States," p. 18.

<sup>2</sup> Wharton's "State Trials of the United States," Preliminary Notes, p. 46.

<sup>3</sup> Mr. Charles Pinckney, a Senator of the United States from South Carolina, in March, 1800, in debate upon a motion for leave to bring in a bill relating to the Judiciary, contended for the absolute independence of the Judicial department, and commented with great severity upon the appointment of Judges of the Supreme

In the beginning of August, 1800, Judge Chase left the Bench to canvass the State of Maryland in behalf of the existing administration, and the result was that the Court, the Chief Justice then being in France, was left without a quorum. Charges to Grand Juries were party harangues, and the State courts adopted in its fullest development "this system of politico-judicialism." It was left for Marshall, after he had become firmly seated on the bench, to lift the Court into that serene and lofty atmosphere, which clothed it with the attributes of a sovereignty beyond the reach of sceptres and crowns. Confined within Constitutional limits, under the con-

Court as Envoys, asserting that it was contrary to the dignity of the President, and the honor and independence of the Judges, to hold out to them the temptation of being Envoys, or of giving them other offices, thus placing in the power of the one to offer, and the others to accept, additional favors. He insisted that no man ought to hold two offices under the same government, and asserted in particular that no judge ought to be absent from the United States, or be drawn from his official station, leaving an undue proportion of its duties to be performed by the remainder of the Bench. Besides this, as the Chief Justice was to preside in case of the Impeachment of the President, and there was no provision in the Constitution to supply a vacancy, therefore if an Impeachment was to take place in his absence, it must remain undecided until the Chief Justice could be sent for. He submitted with great deference that as the President was the only officer on whose trial the Chief Justice was to preside, or on whose Impeachment his absence would be a public inconvenience, it was not perhaps presuming too far on his own infallibility or incapacity to err to send the only officer to a distant country without whose presence in case of an Impeachment a Court could not be formed to try him. Besides this, a judge might be induced to accept any other appointment from the Executive of the Union, and might even accept them from individual States or even from foreign powers, and thus become the minion of the one, or the tool of the other, as circumstances or his own interest might prompt him. He contended for a provision similar to that existing in the State of South Carolina, which by her Constitution provided that no judge should hold any other office of private or public trust under the State, United States, or any other power. (*Benton's Abridgment of the Debates of Congress*, Vol. II, pp. 419, 421.)

It will be remembered that the New Jersey plan expressly provided that none of the judiciary should, during the time they remain in office, be capable of holding any other office or appointment during their term of service. See *Ante*, p. 90.

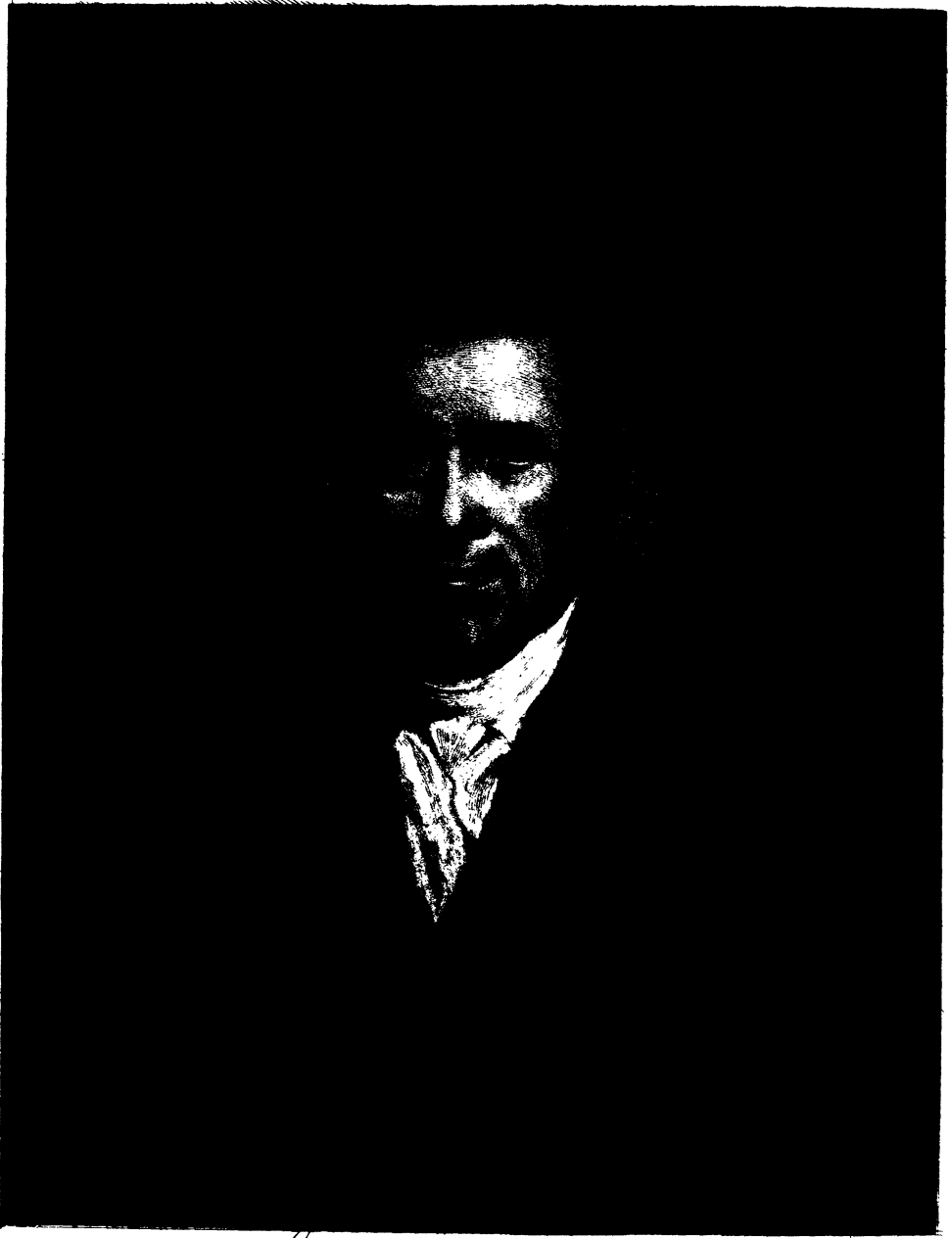
trol of that pure and intrepid jurist, it soon began to develop its great prerogatives as a co-ordinate and co-equal department of the government.

It must not be forgotten, however, that the earliest decisions of the old Supreme Court determined for all time the real character of the new government. They established its national features. They rescued it from State interference and control. The judges, as they entered upon the *terra incognita* of national jurisdiction, were perhaps unconscious of their awful responsibilities, but happily they yielded not to popular clamor, they swerved neither to the right nor to the left from the path in which they were guided by the hand of an overruling Providence. Had they done so, the splendid and majestic career of the nation would have been frustrated, and powers bestowed by the Constitution would have been smitten with incurable palsy. "The real importance of the Supreme Court," says Judge Cooley, "was never greater than at first. And the judges who occupied the Bench before the time of Marshall are entitled to have it said of them that what they did was of incalculable value to representative institutions, not in America alone, but throughout the world. They vindicated the national character of the Constitution; they asserted and maintained the supremacy of the national authority; they made plain for the statesmen as well as the jurists who should come after them the true path of Constitutional interpretation; and while doing so, they also justified in the States, as regards purely State questions, the same right of final judgment which they asserted for the Union in respect to questions which were national."<sup>1</sup>

<sup>1</sup>Thomas M. Cooley, LL.D., "Constitutional History of the United States as seen in the Development of American Law." "The Federal Supreme Court—Its Place in the American Constitutional System," p. 52.







Marshall

## CHAPTER XIII.

THE SECOND EPOCH: 1801-1816. THE SUPREME COURT OF THE UNITED STATES UNDER CHIEF JUSTICE MARSHALL: THE FIRST HALF OF MARSHALL'S JUDICIAL CAREER: SKETCH OF MARSHALL: LEADING DECISIONS: *MARBURY v. MADISON*: REPEAL OF THE JUDICIARY ACT OF 1801: THE MIDNIGHT JUDGES: IMPEACHMENTS OF JUDGE PICKERING AND JUSTICE CHASE: CASES CONSIDERED BY THE COURT: INSTANCES OF FEDERAL SUPREMACY: GROWTH OF FEDERAL POWER: *UNITED STATES v. JUDGE PETERS*: TRIAL OF AARON BURR: RULINGS UPON THE LAW OF HIGH TREASON: *FLETCHER v. PECK*: LAW OF PRIZE AND ADMIRALTY JURISDICTION: CASES OF THE EXCHANGE AND THE *NEREIDE*: LAND CASES: SKETCHES OF JUSTICES JOHNSON, LIVINGSTON, TODD, DUVALL AND STORY: THE EARLY BAR OF THE SUPREME COURT.

IT was a favorable omen that on the day of the first meeting of the Supreme Court of the United States at the City of Washington as the seat of the national government—4th of February, 1801—John Marshall sat as Chief Justice for the first time. He had been summoned to the lofty duty of presiding over the deliberations of the American *Comitia Centuriata*, and, proceeding to the holiest of temples, had been proclaimed a magistrate *salvis auspiciis creatus*.

The appearance of Marshall upon the Bench was an epoch in the history of the Constitution. The hours of provincialism were numbered. The glory and strength of the nation were to come, and the decisions of the great Chief Justice, in which he explained, defended and enforced the Constitution, were to shed upon the ascending pathway of the Republic the combined lustre of learning, intelligence and integrity. "The Providence of God," said Mr. Binney, "is shown most beneficently to the world, in raising up from time to time, and

in crowning with length of days, men of pre-eminent goodness and wisdom." It was Marshall's happy lot to close the services of an active and distinguished life with the longest, most honorable and successful judicial career in the history of the most exalted of tribunals. Fortunate in his opportunities, great in his achievements, he employed his faculties in the creation of a system of jurisprudence which ranks among the admired intellectual productions of the world.

His life was one of reflection and action, of incident and character. A soldier of distinction, a legislator of commanding power, a diplomat skillful and subtle, an historian minute, impartial and accurate, a statesman enlightened and patriotic, a jurist analytical and profound, a magistrate of awful dignity, he displayed in every walk of life the highest qualities, and combined the most opposite characteristics. Born to command, he easily attained the front rank in every species of labor which he undertook, yet his modesty was as great as it was rare. His intercourse with men was graced by an engaging charm, a simplicity, a purity of sentiment, a moral loftiness, an undaunted courage that armed him with a power that not even Jefferson—his bitter enemy—could resist. Whether we view him as a youth, the son of a virtuous and sturdy sire, a child of the people and a product of the soil; or as a soldier facing the dangers of battle or sharing the privations of the camp; or as the champion of the Federal Constitution; or as an envoy outwitting Talleyrand; or as the biographer of Washington; or as an advocate of surpassing strength at the bar; or as a debater in the halls of Congress; or as a Secretary of State and the author of two of the ablest papers in our archives; or as a Judge fit to rank in creative power with Nottingham, Hardwicke, Mansfield or Stowell, we find his career marked with capacity, energy and success. With a mind

mathematical and analytical, not richly stored with technical knowledge as compared with those of Taney or Story, but, conscious of its own strength, working out results with astonishing penetration, and resolving every argument into its ultimate principles; moving among the intricacies of novel questions with calm but persevering circumspection; with a marvelous instinct as to what the law ought to be, which enabled him, while other judges were "creeping timidly from cape to headland, to put boldly out to sea;" close and logical in the connection of his thoughts, clear as light itself in his demonstrations, he conquered by pure ratiocination the intellectual convictions and prejudices of his countrymen, and won by his unsullied character their absolute trust in the integrity of his tribunal. He was in close communion with the Constitution, from the hour of its birth, for a period of thirty-four years, and interpreted its provisions upon the sensible theory that they were not to be restrained in a spirit of jealousy within less than the fair dimensions of its delegated authority, nor were they to be extended beyond them in a spirit of usurpation. By a system of practical construction, and by the exercise of those qualities of lawyer, statesman and patriot, which in their triple union complete the fame of a great Constitutional Judge, he raised the government from a doubtful experiment to an assured success, and established it in the affections and confidence of the people. "He was born," said William Pinkney, "to be the Chief Justice of any country into which Providence should have cast him." His career has called forth the most striking eulogies,<sup>1</sup> but in none of them is the sentiment common to all more sententiously expressed than by Mr. Petigru: "Though his authority as Chief Justice

<sup>1</sup>Those of Wirt, Story, Kent, Webster, Binney, Sergeant, Van Santvoord, Flanders, Shirley, Magruder, Rawle, Phelps and Hitchcock.

of the United States was protracted beyond the ordinary term of public life, no man dared to covet his place, or express a wish to see it filled by another. Even the spirit of party respected the unsullied purity of the Judge, and the fame of the Chief Justice has justified the wisdom of the Constitution and reconciled the Jealousy of Freedom to the Independence of the Judiciary."

He was born at a roadside village, called Germantown, in Fauquier County, Virginia, on the 24th of September, 1755. His grandfather, of the same name, was a native of Wales, and his father, Thomas Marshall, who is described as a man of extraordinary vigor of mind, had been associated with Washington under the appointment of Lord Fairfax in surveying the western territory. As a lad, young Marshall delighted in the sports of the fields, in foot-races and quoit-pitching, in hunting and trapping, and, at a place called "The Hollow," in the midst of the picturesque beauty of the mountains east of the Blue Ridge, laid the foundation of that vigorous health which attended him through life. He was seldom studious, naturally indolent, full of poetic longings, and day dreams and romances. In after life he never lost the simple-mindedness and sensitive modesty of a child, but his ardent social nature, waggish humor and personal magnetism, combined with his physical and moral courage and activity made him the favorite leader of his play-fellows. His earliest instruction was domestic, but at the age of fourteen he was sent to a clergyman named Campbell, in whose house, with James Monroe as a fellow-student, he acquired the rudiments of grammatical and classical knowledge. A year later he received further instruction from a Scotch gentleman named Thomson, the clergyman of the parish, but soon returned home, where he received from his father, who was a practical

surveyor, adequately acquainted with mathematics and astronomy, and familiar with the standard works of history, poetry and general literature, the only real, systematic training that he had as a school-boy. "My father," as he frequently said in after life, "was a far abler man than any of his sons. To him I owe the solid foundation of all my success in life." At eighteen he began the study of the law, but the impending struggle with Great Britain distracted his attention before he had obtained a license to practice. From the time that he was made a lieutenant in a militia company, in the spring of 1775, until the winter of 1779—when he attended the law lectures of Wythe, afterwards Chancellor—at William and Mary College, he was in active service, participating in the battles of Great Bridge, Iron Hill, Brandywine, Germantown, Monmouth, Stony Point, and Paulus Hook, and sharing with unflinching fortitude the sufferings at Valley Forge. In 1780 he was admitted to the bar, and after a short return to the army to meet Arnold's invasion, continued with assiduity the practice of his profession. He served as a member of the Lower House in his native State, and of the Executive Council in the course of the year 1782, and continued intermittently to discharge such public duties until 1795. In 1788 he was one of the sturdiest and most influential of the supporters of the Federal Constitution, when it was before the people of Virginia for approval, and by the side of Madison met the shock of the onslaughts of Henry, Mason and Grayson. So admirable was the temper of his arguments, and such the spirit of sincerity that they breathed that Patrick Henry pronounced upon him the short but comprehensive eulogium: "I have the highest respect and veneration for the honorable gentleman. I have experienced his candor upon all occasions." By this time Marshall's high professional reputation,

great learning, and extraordinary vigor of mind, made him one of the most eminent lawyers of the State. In 1796 he argued the famous case of the British debts in the Circuit Court of the United States, in opposition to Henry, who spoke, as Judge Iredell said, "with a splendor of eloquence," but of Marshall's argument he declared that it was marked by "a depth of investigation and a power of reasoning" exceeding anything he had ever known before. About the same time, in a speech which has been represented as one of the noblest efforts of his genius, he defended the policy of the mission to England, and the treaty of peace negotiated by Mr. Jay. The fame of these admirable arguments spread through the Union, and when he came to Philadelphia in the case of *Ware v. Hylton* before the Supreme Court of the United States—the only case he ever argued before that tribunal—he found that his reputation had preceded him. Soon after, he was tendered the office of Attorney General of the United States, which he declined, but subsequently accepted a special mission to France with Charles Cotesworth Pinckney and Elbridge Gerry, in which he won unbounded popularity by the skill with which he snatched laurels from the brow of Talleyrand. Yielding to the persuasions of Washington he became a member of Congress, at the sacrifice of the place on the bench of the Supreme Court made vacant by the death of Iredell. In the famous debate upon the resolutions of Edward Livingston censuring President Adams for his conduct relative to the extradition of Thomas Nash, otherwise called Jonathan Robbins, Marshall delivered that elaborate and triumphant speech, which, in the language of Judge Story, settled then and forever the points of international law upon which the controversy hinged. It was, says the same high authority, one of the most consummate juridical arguments ever pronounced in the



halls of legislation; and, like Lord Mansfield's answer to the Prussian Memorial, it was *réponse sans réplique*. Upon the retirement of McHenry as Secretary of War, Marshall was appointed, but before he could insist upon the withdrawal of his nomination, the rupture took place between the President and Colonel Pickering, and he was appointed Secretary of State. Here his thorough knowledge of our foreign relations enabled him to manage the affairs of his department with signal ability and success, until the incoming of Jefferson's administration. In the meantime Chief Justice Ellsworth had resigned his place. Marshall, upon being consulted, recommended the appointment of Judge Paterson, but the President objected lest he should wound the feelings of Judge Cushing, an old friend and the senior Justice. Thereupon Jay was appointed but declined. As soon as this was known, Marshall's name was sent to the Senate, which confirmed him unanimously, and on the 31st of January, 1801, he was commissioned as Chief Justice of the United States. In after years John Q. Adams said that if his father had done nothing else to deserve the approbation of his country and posterity, he might proudly claim it for this single act. Marshall was now to crown his illustrious career by labors which have made his name immortal.

Prior to the decision in *Marbury v. Madison*, which is one of the base-stones of his reputation, Marshall, as Chief Justice, delivered five opinions, one involving a claim to salvage turning upon an alleged recapture, in which he undertook to review elaborately our relations towards France in 1799, and declared that they were those of a partial war;<sup>1</sup> one relating to the proper method of appropriating waste

<sup>1</sup>Talbot v. Seeman, 1 Cranch, 1 (1801).

lands in Kentucky;<sup>1</sup> one in which he upheld the treaty obligations of the nation, even though such a course might involve an interference with private rights vested under a decree of condemnation in an inferior court;<sup>2</sup> and two involving mere matters of practice,<sup>3</sup> the latter turning upon nice considerations of the law relating to executions.<sup>4</sup> In all these the conclusions are well and clearly worked out, though at a length much greater than would be deemed necessary at the present day.

In the December term, 1801, Charles Lee, late Attorney-General of the United States, moved for a rule to show cause why a mandamus should not issue addressed to Madison, then Secretary of State, commanding him to deliver a commission to Marbury, whom President Adams, before the expiration of his term, had nominated as a Justice of the Peace for the District of Columbia.<sup>5</sup> The nomination had been confirmed by the Senate. A commission had been filled up, signed by the President, and sealed with the seal of the United States, but had not been delivered when Mr. Jefferson came into office. Acting on the idea that the appointment was incomplete and void so long as the commission remained undelivered, Jefferson countermanded its issue. The application made to the Supreme Court was for the exercise of its original jurisdiction under the terms of the Judiciary Act, and the main question undoubtedly was whether such a writ could issue from the Supreme Court under the gift of a jurisdiction by Congress in direct violation of the terms of the Constitution in distributing original and appellate authority.

<sup>1</sup> *Wilson v. Mason*, 1 Cranch, 45 (1801).

<sup>2</sup> *United States v. Schooner Peggy*, *Ibid.* 103 (1801).

<sup>3</sup> *Resler v. Shehee*, *Ibid.* 111 (1801).      <sup>4</sup> *Turner v. Fendall*, *Ibid.* 117 (1801).

<sup>5</sup> *Marbury v. Madison*, *Ibid.* 137 (1803).

The Court held that delivery was not essential to the validity of letters patent, and that the right of the plaintiff to his office was complete, and hence he was entitled to a remedy; but as Congress could not give original jurisdiction to the Supreme Court, in cases not sanctioned by the Constitution, the application must be refused.

The importance of this decision lies in the fact that it was the first authoritative announcement by the Supreme Court that it had the right as well as the power to declare null and void an act of Congress in violation of the Constitution. It declared that the Constitution was to be regarded as an absolute limit to legislative power; that Congress could not pretend to possess the omnipotence of Parliament. And although in some respects the decision was *obiter dictum*, since the Court declared in the end that it had no jurisdiction of the case, yet it has always been understood as establishing principles which have never since been controverted, subjecting the ministerial and executive officers of the government all over the country to the control of the courts in regard to the execution of a large part of their duties.<sup>1</sup>

The Chief Justice, in the course of his opinion, said:

“If it had been intended to leave it in the discretion of the Legislature to apportion the judicial power between the Supreme and inferior Courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction. If Congress remains at liberty to give this Court appellate jurisdiction where the Constitution has declared their

<sup>1</sup> Address of Mr. Justice Miller on the Supreme Court of the United States, delivered June 29, 1887, before the Alumni of the Law Department of the University of Michigan. See also *United States v. Schurz*, 102 United States Reports, 407 (1880).

jurisdiction shall be original, and original jurisdiction where the Constitution has declared it shall be appellate, the distribution of jurisdiction made in the Constitution is form without substance. . . . The question whether an act repugnant to the Constitution can become the law of the land, is a question deeply interesting to the United States, but happily not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles supposed to have been long and well established to decide it. . . . The powers of the Legislature are defined and limited; and that those limits may not be mistaken or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it, or that the Legislature may alter the Constitution by an ordinary act. Between these alternatives there is no middle ground. The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the Legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written Constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable. . . . If an act of the Legislature repugnant to the Constitution is void, does it, notwithstanding its invalidity, bind the Courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory, and would seem at first view an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration. It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each. So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the Court must either decide that case conformably to the

law, disregarding the Constitution, or conformably to the Constitution, disregarding the law,—the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If, then, the Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.”

From this remorseless logic there could be no escape.

Apart from the interest which will always be taken by lawyers in this famous decision, as establishing a principle which lies at the foundation of our constitutional jurisprudence, and which places the judiciary upon an independent and lofty plane, there are certain dramatic features attached to it which grew out of the history of the times. A recent historian has pointed out that in the appointment of Marshall John Adams had intended to perpetuate the Federal principles of his administration, and that Marshall was as obnoxious to Jefferson as the most rigid New England Calvinist would have been, for Jefferson had determined upon restricting the powers of the National Government in the interests of human liberty, and Marshall was bent upon enlarging the powers of the government in the interests of justice and nationality.<sup>1</sup>

As the new President and the new Chief Justice stood face to face upon the threshold of their power, each could foresee that the contest between them would end only with life. The judgment of posterity has crowned Marshall as the victor.

Marbury and Madison, says another writer, were the John Doe and Richard Roe of the ejection; the real issue was

<sup>1</sup> Henry Adams, “History of the United States, 1801 to 1805,” Vol. I, p. 192.

between John Marshall and Thomas Jefferson—a trial of strength in their new positions.<sup>1</sup>

The opinion of Marshall was regarded by Jefferson as a defiance. Even the strongest admirers of the Chief Justice admit that his manner of dealing with the case was unusual. Ordinarily where a cause was to turn on a question of jurisdiction, the Court would consider that point as first and final, but instead of beginning at that point and dismissing the motion the Court reversed the order of discussion in the manner already indicated. The settled bent of Marshall's mind was towards the maintenance of the sanctity of pledged word; the Executive should be held to the performance of a contract, and although the Court could not intermeddle with the prerogative of the Executive, it might and would command the head of a department to perform a duty not depending on executive discretion, but on particular acts of Congress and the general principles of law.

It may well be, also, that Marshall smarted under a sense of wrong growing out of the suspension of the sessions of the Supreme Court by legislative artifice, under the dictation of the President, for a period of fourteen months, which delayed the delivery of the opinion until February, 1803. The Federalists, at the close of their days of power, had, by an Act of Congress, dated the 13th of February, 1801,<sup>2</sup> sought to entrench themselves, as their critics and political opponents alleged, in the judiciary department, by re-arranging the judicial Districts and by the establishment of separate Circuit Courts. Twenty-two Districts were established, and were

<sup>1</sup> Shirley, "Dartmouth College Cases and the Supreme Court of the United States," p. 393.

<sup>2</sup> Act of 13th February, 1801, Laws of the United States, Vol. III, p. 405, Ed. of 1815.

divided into six Circuits. In each of the Circuits, except the sixth, there were to be three Circuit Court Judges, one of whom should be commissioned as Chief Judge, and none of whom should be judges of the Supreme Court of the United States. In the sixth Circuit the Circuit Court was to consist of a Circuit judge and the two judges of the District courts of the Districts of Kentucky and Tennessee, and the old District courts in those Districts were abolished. The number of Justices of the Supreme Court was to be reduced after the next vacancy to five, making a Chief Justice and four Associates. This new arrangement, which was intended to meet the Constitutional objections which had been raised by the Judges of the Supreme Court themselves as to their sitting at circuit, as well as to provide an intermediate court of appeal, entirely separate in its personality from that of the Court of last resort, gave to President Adams the appointment of sixteen new judges, and their commissions were signed and delivered upon the eve of his departure from office, and the incumbents were derisively styled "The Midnight Judges." The moment that Jefferson came into power a systematic and well-organized attack was made upon the Federal judiciary. The Act establishing separate Circuit Courts was repealed after a long and acrimonious debate in Congress<sup>1</sup> notwithstanding the Constitutional argument that was made by the Federalists in opposition, and in order to prevent Chief Justice Marshall and his Associates from interfering with the new arrangements, Congress, while destroying the new Circuit Courts, adopted the drastic remedy of suspending for more than a year the sessions of the Supreme

<sup>1</sup> Act of March 8, 1802, Laws of United States, Vol. III, p. 450, Ed. of 1815. Also Act of April 29, 1802, *Ibid.* p. 479. See Adams' "History of the United States," Vol. I, pp. 274, 298, Vol. II, p. 143.

Court itself by abolishing the August term. This Congressional assault was followed up by the impeachment of Judge Pickering who had become insane from habits of drinking, and by the impeachment of Justice Chase, an Associate Justice of the Supreme Court, whose violent partisan harangues from the Bench, and whose conduct upon the trial of Fries six years before, were seized upon as pretexts, the real object being to establish the point that the bench could be reached through impeachment for high crimes and misdemeanors. These movements were intended to be the forerunners of a general attack upon those members of the judiciary, including Marshall himself, who seemed bent upon the consolidation of the government through the judiciary department.

Pickering, the United States District Judge for the District of New Hampshire, was found guilty, although clearly insane, a fact which robbed his conviction of its significance, while the triumphant acquittal of Chase, through the extraordinary skill and ability of his counsel, Luther Martin, Robert G. Harper and Joseph Hopkinson, in compelling John Randolph and his fellow-managers to admit that the phrase "high crimes and misdemeanors" in the Constitution meant indictable offences, proved the safety of the Supreme Court, and rescued the Judiciary from the dangers of its position. Thenceforth John Marshall was safe, and he proceeded at his leisure to establish the principles of Constitutional law.

John Randolph, in a rage, submitted an amendment to the Constitution: "The Judges of the Supreme Court and all other Courts of the United States shall be removed by the President on the joint address of both Houses of Congress." But he could not command sufficient support. The bitterness of Jefferson had not died out when, fifteen years later, he



wrote to a friend:<sup>1</sup> "The judiciary of the United States is the subtle corps of sappers and miners constantly working underground to undermine the foundations of our confederated fabric. They are construing our Constitution from a co-ordination of a general and special government to a general and supreme one alone. . . . Having found from experience that impeachment is an impracticable thing, a mere scarecrow, they consider themselves secure for life; they skulk from responsibility. . . . An opinion is huddled up in conclave, perhaps by a majority of one, delivered as if unanimous, and with the silent acquiescence of lazy and timid associates, by a crafty chief judge who sophisticates the law to his mind by the turn of his own reasoning."

Once more did Marshall have an opportunity of reflecting upon the President. In *Little v. Barreme et al.*,<sup>2</sup> a commander of a ship-of-war was held answerable in damages to a person injured, even though he had acted under the instructions of the President. "Instructions not warranted by law," said the Chief Justice sententiously, "cannot legalize a trespass."

Some years elapsed before a second question of national importance arose. In the meantime a variety of cases were decided, to which a general reference will be sufficient to indicate their extent and character. Presumption of payment;<sup>3</sup> application of payments;<sup>4</sup> commercial paper;<sup>5</sup> indorsements;<sup>6</sup>

<sup>1</sup> Letter of Thomas Jefferson to Thomas Ritchie, December 25, 1820, "Jefferson's Works," Vol. VII, p. 192.

<sup>2</sup> 2 Cranch, 170 (1804).

<sup>3</sup> *Dunlop & Co. v. Ball*, 2 Cranch, 180 (1804).

<sup>4</sup> *Field et al. v. Holland et al.*, 6 Cranch, 8 (1810).

<sup>5</sup> *French's Exr. v. Bank of Columbia*, 4 Cranch, 142 (1807).

<sup>6</sup> *Clark v. Young & Co.*, 1 Cranch, 181 (1803). *Wilson v. Lenox*, *Ibid.*, 194 (1803). *Mandeville & Jameson v. Riddle & Co.*, *Ibid.*, 290 (1803). *Yeaton v. Bank of Alexandria*, 5 Cranch, 49 (1809). *Dulany v. Hodgkin*, *Ibid.*, 333 (1809).

insurance;<sup>1</sup> salvage;<sup>2</sup> prize;<sup>3</sup> violations of the embargo or non-intercourse act;<sup>4</sup> patent rights;<sup>5</sup> chancery jurisdiction in cases of dower;<sup>6</sup> tacking;<sup>7</sup> equity pleading;<sup>8</sup> pleading at law;<sup>9</sup> devise;<sup>10</sup> abatement of legacies;<sup>11</sup> evidence;<sup>12</sup> usury;<sup>13</sup> set-off;<sup>14</sup> land laws;<sup>15</sup> the ownership of slaves;<sup>16</sup> statutes of limitation;<sup>17</sup> wills, executors and trustees<sup>18</sup>—these and kindred subjects, argued at length with the most profuse display of learning, were patiently and exhaustively considered. Several points of jurisdiction were determined: Federal jurisdiction being sustained in a case between citizens of the same State, where the plaintiffs were only nominal plaintiffs for the use of an alien,<sup>19</sup> and declined where all the parties were aliens.<sup>20</sup> It was also held that a citizen of the District of Columbia

<sup>1</sup> *Head & Amory v. Providence Ins. Co.*, 2 Cranch, 128 (1804). *Church v. Hubbard*, *Ibid.*, 187 (1804). *Graves & Barnewall v. Boston Marine Ins. Co.*, *Ibid.*, 419 (1805). *Marine Ins. Co. of Alexandria v. Wilson*, 3 Cranch, 187 (1805).

<sup>2</sup> *Mason v. Ship Blaireau*, 2 Cranch, 240 (1804).

<sup>3</sup> *Armitz Brown v. The United States*, 8 Cranch, 110 (1814). *Talbot v. Seeman*, 1 Cranch, 1 (1801). *Murray v. Schooner Charming Betsey*, 2 Cranch, 64 (1804).

<sup>4</sup> *United States v. Brig Eliza*, 7 Cranch, 113 (1812). *Brig Penobscot v. United States*, *Ibid.*, 356 (1813).

<sup>5</sup> *Tyler et al. v. Tuel*, 6 Cranch, 324 (1810).

<sup>6</sup> *Herbert et al. v. Wren and wife et al.*, 7 Cranch, 370 (1813).

<sup>7</sup> *Fitzsimmons v. Ogden*, 7 Cranch, 2 (1812).

<sup>8</sup> *Milligan, Admr. v. Milledge and wife*, 3 Cranch, 220 (1805).

<sup>9</sup> *Cooke v. Graham's Admr.*, 3 Cranch, 229 (1805).

<sup>10</sup> *Lambert's Lessee v. Paine*, 3 Cranch, 97 (1805).

<sup>11</sup> *Silsby v. Young & Silsby*, 3 Cranch, 249 (1806).

<sup>12</sup> *Wilson v. Speed*, 3 Cranch, 283 (1806).

<sup>13</sup> *Levy v. Gadsby*, 3 Cranch, 180 (1805).

<sup>14</sup> *Winchester v. Hackley*, 2 Cranch, 343 (1804).

<sup>15</sup> *Huidekoper's Lessee v. Douglass*, 3 Cranch, 1 (1805).

<sup>16</sup> *Scott v. Negro Ludlow*, 3 Cranch, 325 (1806).

<sup>17</sup> *Faw v. Roberdeau's Excr.*, 3 Cranch, 175 (1805).

<sup>18</sup> *Griffith v. Frazier*, 8 Cranch, 11 (1814).

<sup>19</sup> *Browne v. Strode*, 5 Cranch, 303 (1809).

<sup>20</sup> *Montalet v. Murray*, 4 Cranch, 47 (1807).

was not a citizen of a State within the meaning of the Constitution, and could not sue a citizen of Virginia in the Circuit Court for the Virginia District. "It is extraordinary," said the Chief Justice, "that courts open to aliens, and to the citizens of every State in the Union, should be closed upon them, but this is a subject for legislative and not judicial consideration."<sup>1</sup> It was also ruled that where there are two or more joint plaintiffs, and two or more joint defendants, each one of the plaintiffs must be capable of suing each of the defendants to support Federal jurisdiction.<sup>2</sup> Where the decision of a State Court was in favor of the privilege claimed under an Act of Congress, it was held that the Supreme Court had no jurisdiction on a writ of error to a State Court under the 25th Section of the Judiciary Act.<sup>3</sup>

In *McIlvaine v. Coxe's Lessee*<sup>4</sup> the question was twice argued whether a person born in the colony of New Jersey before the war with Great Britain, and who resided there until 1777, and then joined the British army, and afterwards went to England, where he resided ever afterwards, and always claimed to be a British subject, could take lands in New Jersey by descent from a citizen of the United States. Although the Court declined, as they had done twice before, to pass directly upon the question of expatriation,<sup>5</sup> yet they held that he could

<sup>1</sup>Hepburn and Dundas v. Ellzey, 2 Cranch, 445 (1805). This was in accordance with the result reached in *Reily v. Lamar et al.*, 2 Cranch, 344 (1805), where it was held that the inhabitants of the District of Columbia by its separation from Virginia and Maryland ceased to be citizens of those States respectively. A similar disability rests upon a citizen of a Territory, who cannot sue a citizen of a State in the Courts of the United States. A Territory is not a State in the sense intended by the Constitution. *Corporation of New Orleans v. Winter*, 1 Wheaton, 92 (1816).

<sup>2</sup>*Strawbridge v. Curtiss*, 3 Cranch, 267 (1806).

<sup>3</sup>*Gordon v. Caldcleugh*, 3 Cranch, 269 (1806).

<sup>4</sup>2 Cranch, 280 (1804).

<sup>5</sup>See *Talbot v. Jansen*, 3 Dallas, 133 (1795). *The Charming Betsey*, Circuit Ct. of Penna., 26th May, 1802, S. C. 2 Cranch, p. 64 (1804).

take and hold such lands, as New Jersey as a sovereign State had the right to compel her inhabitants to become citizens thereof, as she had endeavored to do by an act of 1776, nor could the State allege alienage in one over whom she had asserted authority; nor did the Treaty of Peace diminish her sovereignty.<sup>1</sup> In contrast with this was the decision that a person born in England before the year 1775, and who always resided there and never was in the United States, is an alien, and could not, in the year 1793, take lands in Maryland by descent from a citizen of the United States.<sup>2</sup>

Federal supremacy was sustained in a series of interesting cases, in several of which the Chief Justice speaks in a tone of conscious pride and strength. In sustaining the claim of the United States to a preference in all cases of insolvency or bankruptcy<sup>3</sup> he says:

"This claim of priority on the part of the United States will, it has been said, interfere with the right of the State sovereignties respecting the dignity of debts, and will defeat the measures they have a right to adopt to secure themselves against delinquencies on the part of their own revenue officers. But this is an objection to the Constitution itself. The mischief suggested, so far as it can really happen, is the necessary consequence of the supremacy of the laws of the United States on all subjects to which the legislative power of Congress extends."

The paramount obligations of the Treaty of Peace were again asserted, and it was held that the Virginia statute of limitations could not operate upon debts contracted before the date of the treaty.<sup>4</sup> In *Jennings v. Carson*,<sup>5</sup> in affirmance of

<sup>1</sup> *McIlvaine v. Coxe's Lessee*, 4 Cranch, 211 (1808).

<sup>2</sup> *Dawson's Lessee v. Godfrey*, 4 Cranch, 321 (1808).

<sup>3</sup> *U. S. v. Fisher et al.*, 2 Cranch, 358 (1804).

<sup>4</sup> *Hopkirk v. Bell*, 3 Cranch, 454 (1806).

<sup>5</sup> 4 Cranch, 2 (1807).

*Penhallow v. Doane*,<sup>1</sup> it was held that the District Courts of the United States were courts of prize, and had power to carry into effect the sentences of the old Continental Courts of Appeal in cases of Capture. About the same time it was ruled, with some display of offended dignity, that the Courts of the United States will not enforce an agreement entered into in fraud of a law of the United States, even though the parties to the agreement were public enemies and the agreement was a mere stratagem of war.<sup>2</sup>

We now encounter a signal instance of the growth of Federal power. As has been seen,<sup>3</sup> in the case of the sloop *Active*, the State of Pennsylvania was able to resist successfully the execution of a decree entered by the Standing Committee of Appeals in Cases of Capture, reversing the judgment of her own Court of Admiralty sustaining as final the verdict of a jury distributing prize money. The Continental Congress, although defending their jurisdiction by the most pointed and unanswerable logic, had cowered before the authority of the State and shrunk timidly from any prospect of collision, abandoning the appellants to their fate. Quietly awaiting the course of events, Olmstead, whose original appeal had been brought in 1779, watched the collapse of the Confederation, the adoption of the Constitution and the establishment of the new government, and then availing himself of the doctrine of *Penhallow v. Doane*, filed his libel in the District Court for the District of Pennsylvania and obtained a decree in his favor. Upon the refusal of Judge Peters to grant an attachment, who for prudential reasons deemed it best to avoid embroiling the government of the United States and that of Pennsylvania, an application was made to the Supreme Court

<sup>1</sup> 3 Dallas, 54 (1795).

<sup>2</sup> *Hannay v. Eve*, 3 Cranch, 242 (1806).

<sup>3</sup> *Ante*, Chap. IV., p. 53.

in 1808, for a mandamus to be directed to the Judge.<sup>1</sup> The writ was awarded by the Chief Justice in one of his most characteristic judgments. "With great attention and serious concern" he examined the question of jurisdiction, and after a calm but convincing course of reason in support of Federal power, solemnly declared:

"If the legislatures of the several States may at will annul the judgments of the Courts of the United States, and destroy the rights acquired under those judgments, the Constitution itself becomes a solemn mockery, and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals. So fatal a result must be deprecated by all, and the people of Pennsylvania not less than the citizens of every other State must feel a deep interest in resisting principles so destructive of the Union, and in averting consequences so fatal to themselves." . . . "The State of Pennsylvania can possess no Constitutional right to resist the legal process which may be directed in this case. It will be readily conceived that the order which this Court is enjoined to make by the high obligations of duty and of law is not made without extreme regret at the necessity which has induced the application. But it is a solemn duty and therefore must be performed."

There could be but little doubt as to the result when John Marshall sounded such a note, but the State still maintained an attitude of defiance. The subsequent proceedings, though not occurring in the Supreme Court, are interesting as showing that the national gristle had hardened into bone. Service of the attachment was resisted by the State militia under General Bright, who had been called out by the Governor, under the sanction of the Legislature. The Marshal retired, naming a day for the service of the warrant, and summoned a posse of two thousand men. Bloodshed was imminent. The Governor appealed to President Madison,

<sup>1</sup>U. S. *v.* Judge Peters, 5 Cranch, 115 (1809).

begging him to discriminate between factious opposition to the laws of the United States and resistance to the decree of a Judge founded on a usurpation of power, but Madison replied that he was not only unauthorized to prevent the execution of a decree of the Supreme Court, but was specially enjoined by statute wherever any such decree was resisted to aid in its enforcement. The State then beat a retreat. The Legislature appropriated money to pay the decree, and Olmstead, after a struggle for justice which had lasted thirty years, obtained the fruits of his valor. But the conflict had not ended. General Bright and his men were brought to trial, for forcibly obstructing Federal process, before Mr. Justice Washington, and after a sharp contest were convicted and sentenced to fine and imprisonment.<sup>1</sup> These were remitted by the President on the ground that the prisoners had acted under a mistaken sense of duty, but the priceless principle had been established that the Constitution and laws of the United States were the supreme law of the land, and that the Judges in every State were bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

In the important and interesting case of *Ex parte Bollman* and *Ex parte Swartwout*,<sup>2</sup> the Chief-Justice dealt with the power of the Court to issue the writ of habeas corpus, as well as with the law of treason. Colonel Swartwout was the Chief of Staff of Aaron Burr, and had borne a letter in cipher from Burr to General Wilkinson, then Commander-in-

<sup>1</sup> Trial of General Bright, in the Circuit Court of the United States, for the District of Pennsylvania, printed at Philadelphia, 1809. Richard Peters, Jr., "The whole Proceedings in the case of Olmstead *v.* Rittenhouse," Philadelphia, 1809. United States *v.* Peters, 5 Cranch, 115 (1809). Ross *et al.* Executors *v.* Rittenhouse, 2 Dallas, 160 (1792). Journals of Continental Congress, Vol. 5, 372.

<sup>2</sup> 4 Cranch, 75 (1807).

chief of the Army of the United States, and the Military Governor of the newly-acquired territory of Louisiana. The letter disclosed the particulars of an intended movement down the Ohio and Mississippi, *en route* to New Orleans, and thence to Mexico. Wilkinson, who succeeded in weaving a web of mystery about his real attitude towards the enterprise, pretended to hesitate as to his conduct, but finally disclosed the treasonable conspiracy to the President, who issued a proclamation denouncing it. Wilkinson then seized Swartwout, Bollman and others, as emissaries of Burr, and sent them under guard to Washington, where they were committed by the Circuit Court of the District of Columbia on the charge of treason. Motions were made in their behalf for writs of habeas corpus, and the question of the power of the Court to issue such a writ was elaborately argued. Mr. Justice Chase doubted the jurisdiction of the Court in any case, although he agreed that any of the Judges might issue the writ at chambers if the application were made within the proper Circuit. Mr. Justice Johnson thought that the power was given to the Judges merely as auxiliary to some other jurisdiction, but could not be exercised by the Court collectively. His views were clearly and ably stated, and a most skillful use made of *Marbury v. Madison*. He insisted that no original powers could be vested by Congress in the Supreme Court beyond those to which the Court was restricted by the Constitution, and that the principle of that decision applied as much to the issuing of a habeas corpus in a case of treason as to the issuing of a mandamus in a case not more remote from the original jurisdiction of the Court. Marshall, at the very outset of his opinion, expressly disclaimed all jurisdiction not given by the Constitution or by the laws of the United States, and refused to yield to the



argument which had been made by Harper that the writ might issue at common law; but he considered that the Fourteenth Section of the Judiciary Act contained a substantive grant of the power, and pointed out that the terms of the grant must include the Supreme Court, because a denial would involve a denial of power to every other Court:

“Whatever motives might induce the Legislature to withhold from the Supreme Court the power to award the great writ of habeas corpus, there could be none which would induce them to withhold it from every Court in the United States; and as it is granted to all in the same sentence and by the same words, the sound construction would seem to be, that the first sentence vests this power in all the Courts of the United States; but as those Courts are not always in session, the second sentence vests it in every judge or justice of the United States.”

The second point he treated briefly:

“In the mandamus case it was decided that this Court would not exercise original jurisdiction except so far as that jurisdiction was given by the Constitution. But so far as that case has distinguished between original and appellate jurisdiction, that which the Court is now asked to exercise is clearly appellate. It is the revision of a decision of an inferior Court by which a citizen has been committed to jail.”

The motion being granted, the Court, after argument, considered whether there was sufficient evidence to justify a holding to bail, and in the course of a most elaborate opinion discussed the law of treason. After quoting the language of the Constitution, Marshall rules:

“To constitute that specific crime for which the prisoners now before the Court have been committed, war must be actually levied against the United States. However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason. To conspire to levy war, and actually to levy war, are distinct offences. The first must be brought into operation by the assem-

blage of men for a purpose treasonable in itself, or the fact of levying war cannot be committed. . . . It is not the intention of the Court to say that no individual can be guilty of this crime who has not appeared in arms against his country. On the contrary, if war be actually levied,—that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose,—all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors. But there must be an actual assembling of men for the treasonable purpose to constitute a levying of war.”

Whatever might have been the connection of the prisoners with Burr and the operations set on foot by him, yet the offence of treason was not established to the satisfaction of the Court, and they were discharged. Upon the trial of Burr, over which Marshall presided, it was found necessary to explain and defend these doctrines. Upon the struggle to connect Burr with the transactions at Blennerhassett’s Island, which proved the turning-point of the case, the Chief Justice, while still adhering to the rule laid down in the case of *Bollman and Swartwout*, which had been severely criticized as countenancing constructive treason, ruled out as irrelevant and inadmissible all the testimony offered by the United States to connect the prisoner, who it was admitted was at a great distance in a different State, with the alleged levying of war on the island.

These rulings were bitterly assailed. “Marshall,” said Wirt, “has stepped in between Burr and death.” Burr himself, when subsequently held to bail upon a charge of misdemeanor, declared it was “a sacrifice of principle to conciliate Jack Cade.” Giles, a Senator of the United States from Virginia, introduced a bill at the next session of Congress to define treason, exclaiming with great warmth: “I have learned that judicial opinions on this subject are like change-

able silks, which vary their colors as they are held up in political sunshine." At this time, when the passions and prejudices of the hour have perished, it is possible to form a calm judgment of the matter, and it is not too much to assert that the august figure of Marshall presented the impersonation of unbending, inflexible justice.

"The impartiality which marked the conduct of those trials was never excelled in history. . . . No greater display of judicial skill and judicial rectitude was ever witnessed. . . . The Judge was unmoved by criticism, no matter from what quarter, and was content to await the judgment of posterity, that never, in all the dark history of State trials, was the law, as then it stood and bound both parties, ever interpreted with more impartiality to the accuser and the accused."<sup>1</sup>

"Why did you not tell Judge Marshall that the people of America demanded a conviction?" was the question put to Wirt after the trial. "Tell *him* that!" was the reply. "I would as soon have gone to Herschel, and told him that the people of America insisted that the moon had horns, as a reason why he should draw her with them."<sup>2</sup>

The case of *Fletcher v. Peck*<sup>3</sup> will be always memorable as the first of that long line of instances in which the statutes of a State repugnant to the Constitution have been held to be void. It is the first judicial determination of a constitutional restriction upon the powers of the States. It towers above the decisions of a period of many years, important and imposing though they are, and, with *Marbury v. Madison*, stands as an outspur of that magnificent range of adjudications which bear to our Constitutional jurisprudence the relative

<sup>1</sup> Oration by Wm. Henry Rawle, LL.D., at the unveiling of the Statue of Chief Justice Marshall at Washington, May 10, 1884.

<sup>2</sup> Van Santvoord's "Lives of the Chief-Justices," p. 379.

<sup>3</sup> 6 Cranch, 87 (1810).

strength and majesty of the Rocky Mountains to our physical geography. The State of Georgia had sought by legislative enactment to destroy rights acquired under a previous statute of the same State, granting lands to an individual. It was held that a grant was a contract executed, the obligation of which continued; and since the Constitution drew no distinction between contracts executed and executory, the Constitutional clause must be so interpreted as to comprehend both.

"A law annulling conveyances between individuals and declaring that the grantors should stand seized of their former estates notwithstanding these grants," said the Chief-Justice, "would be as repugnant to the Constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances. It would be strange if a contract to convey was secured by the Constitution, while an absolute conveyance remained unprotected."

Nor was the sovereignty of a State too exalted for the restrictions of this clause:

"Whatever respect might have been felt for the State sovereignties, it is not to be disguised that the framers of the Constitution viewed with some apprehension the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions upon the legislative power of the States are obviously founded in this sentiment, and the Constitution of the United States contains what may be deemed a bill of rights for the people of each State."

The same great principle of the sanctity of rights vested under legislative grants was illustrated and enforced within a few years afterwards, as against a similar course of action on the part of New Jersey, Virginia and New Hampshire.<sup>1</sup>

<sup>1</sup> *The State of New Jersey v. Wilson*, 7 Cranch, 164 (1812). *Terrett v. Taylor*, 9 Cranch, 43 (1815). *The Town of Pawlet v. Daniel Clark et al.*, 9 Cranch, 292 (1815).

It was only after a most cautious examination, however, that such results were reached. The language of the Court was solemn and dignified; no trace of passion or vindictive heat is discernible:

“The question whether a law be void for its repugnance to the Constitution is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The Court, when impelled by duty to render such a judgment, would be unworthy of its station could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the Legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the Constitution and the law should be such that the Judge feels a clear and strong conviction of their incompatibility with each other.”<sup>1</sup>

In the case of a corporation suing as plaintiff, it was held that a corporation aggregate, composed of citizens of one State, might sue a citizen of another State in the Federal Courts; but where the jurisdiction depended, not on the character of the parties, but upon the nature of the case, the Judiciary Act could confer no jurisdiction on the Circuit Courts except where a controversy arose between citizens of the same State claiming lands under grants from different States.<sup>2</sup> It was also determined that, though the appellate powers of the Supreme Court had been given by the Constitution, yet they were limited and regulated by the Acts of Congress.<sup>3</sup> While adjusting the relations of Federal and State tribunals, it was held that a Court of the United States could not enjoin proceedings in a State Court,<sup>4</sup> nor had a State

<sup>1</sup> *Fletcher v. Peck*, 6 Cranch, 87 (1810).

<sup>2</sup> *The Bank of the United States v. Deveaux*, 5 Cranch, 62 (1809).

<sup>3</sup> *Durousseau and others v. The United States*, 6 Cranch, 308 (1810).

<sup>4</sup> *Diggs & Keith v. Wolcott*, 4 Cranch, 179 (1807).

Court jurisdiction to enjoin a judgment of the Circuit Court of the United States,<sup>1</sup> nor could a State tribunal interfere, by process of replevin, injunction or otherwise, with a seizure of property made by revenue officers under the laws of the United States.<sup>2</sup>

Another most important matter of jurisdiction was settled at this time, although long settled, as Judge Johnson said, in public opinion. It was held that the Courts of the United States could not exercise a Common law jurisdiction in criminal cases,—a doctrine in striking opposition to the views of Jay and his Associates.<sup>3</sup>

The law of Prize and Admiralty Jurisdiction now began to assume shape and prominence. The slender body of decisions pronounced by the early judges of the Court could scarcely be said to constitute a system. This branch of the law was then in its infancy; but the non-intercourse and embargo acts and the War of 1812 created a new class of cases, which called for the establishment of general principles. The conflicting rights of captors, of neutrals and belligerents, trading under licenses or privateering under letters of marque and reprisal, were to be adjusted.<sup>4</sup> One of the most important of the earliest decisions of Marshall was that of *Rose v. Himely*,<sup>5</sup> which involved the question whether the Courts of this country could examine into the authority of a foreign tribunal acting as a prize court, and disregard its sentence of condemnation, and if so, whether such sentence of a foreign tribunal is valid, when the vessel at the time was actually

<sup>1</sup> *McKim v. Voorhies*, 7 Cranch, 279 (1812).

<sup>2</sup> *Slocum v. Mayberry*, 2 Wheaton, 1 (1817).

<sup>3</sup> *The United States v. Hudson & Goodwin*, 7 Cranch, 32 (1812). See early cases, *ante*, p. 166.

<sup>4</sup> See "Life and Letters of Joseph Story," Vol. I, pp. 226-227.

<sup>5</sup> 4 Cranch, 241 (1808).

lying in an American port. Several cases depended upon this decision, and they were all elaborately argued by the most eminent practitioners of the day, Charles Lee, Robert G. Harper, A. J. Dallas, William Rawle, Jared Ingersoll, P. S. Duponceau, Edward Tilghman and Luther Martin, the latter speaking for three days, until the spectators, as we are assured by Judge Story, then present as a visitor, were "fatigued almost to death."<sup>1</sup> The decision was pronounced by the Chief Justice—clear, luminous, argumentative, pointed and brief—affirming the right, upon principle, to examine into the jurisdiction of the foreign tribunal, and disregard its sentence, if inconsistent with the law of nations. As in the case at bar the captured vessel had not been carried within the jurisdiction of the French Court at St. Domingo, the sentence of that tribunal was held invalid. The majority of the Court concurred in holding that, though the rights of war might be exercised by a country on the high seas, yet that the legislation of every country being territorial, its rights of sovereignty in the execution of a mere municipal law must be exercised within its own territory, and therefore that the seizure of a vessel not belonging to a subject, made on the high seas, for the breach of a municipal regulation, was an act which the sovereign could not authorize, and such seizure was invalid. To this last proposition Justices Livingston, Cushing and Chase did not accede. The question occurred again in *Hudson v. Guestier*,<sup>2</sup> and the Court, through

<sup>1</sup>The mode of arguing cases in the Supreme Court at that day was excessively tedious and prolix. The two-hour rule was not then in force. Long chancery bills, with overloaded documents, and long common law records, with scores of bills of exceptions attached to them, crowded the docket. Speeches consumed several days, and sometimes a week, on each side. See "Life and Letters of Joseph Story," Vol. I, p. 217. Van Santvoord's "Lives of the Chief-Justices," p. 384.

<sup>2</sup>6 Cranch, 281 (1810).

Mr. Justice Livingston, the Chief Justice dissenting, overruled the doctrine. In the later case of *Williams and others v. Armroyd*,<sup>1</sup> it was said to be settled that the sentence of a competent court proceeding *in rem* is conclusive with respect to the thing itself. No Court of co-ordinate jurisdiction can examine the sentence; and though a foreign tribunal should condemn American neutral property under an edict unjust in itself, contrary to the law of nations, and in violation of neutral rights, as declared by the Executive and Legislative authority of the United States, yet the Courts of this country cannot lend their aid to the owner to recover such property, because they cannot revise, correct, or even examine the sentence of the foreign tribunal.

The *Exchange*,<sup>2</sup> an American merchantman, had been captured by a French vessel, under one of the decrees of Napoleon. Having been armed and commissioned in the French service, she was sent with despatches to the East Indies and put into the port of Philadelphia in distress, where she was proceeded against by the American owners. The French minister claimed that as she was a French national vessel she was not amenable to judicial process. It was held that her original ownership had been changed by her capture; that her nationality had been duly changed, and having entered an American port from necessity, where she had demeaned herself in a friendly way, she was entitled to be treated in the same manner as any other public armed vessel of the French Emperor, with whom we were at peace, and therefore was exempt from the jurisdiction of the United States.

The celebrated case of the *Nereide*<sup>3</sup> came before the Court

<sup>1</sup> 7 Cranch, 423 (1813).

<sup>2</sup> The schooner *Exchange v. McFadden and others*, 7 Cranch, 116 (1812).

<sup>3</sup> 9 Cranch, 389 (1815).



in 1815. The claimant, Mr. Pinto, a merchant and native of Buenos Ayres, being in London, had chartered the vessel, which had been armed and commissioned by Great Britain, to carry his own goods and the property of his family to his home. He took passage on the vessel, which sailed under British convoy, and having been separated from the squadron, was captured off the island of Madeira, after a short action, by an American privateer. The claim had been rejected in the District Court, and the goods condemned upon the ground that they were captured on board of an armed enemy's vessel, which had resisted the exercise of the right of search. The case was argued in the Supreme Court with the most extraordinary eloquence, particularly on the part of Mr. Pinkney, whose dazzling rhetoric, although unsuccessful, so heated the calm mind of Marshall as to lead him to express himself in the following exalted strain:

"The *Nereide* was armed, governed and conducted by belligerents. With her force or her conduct the neutral shippers had no concern; they deposited their goods on board the vessel, and stipulated for their direct transportation to Buenos Ayres. It is true, that on her passage she had a right to defend herself, and might have captured an assailing vessel; but to search for the enemy would have been a violation of the charter party and of her duty. With a pencil dipped in the most vivid colors, and guided by the hand of a master, a splendid portrait has been drawn, exhibiting this vessel and her freighter as forming a single figure, composed of the most discordant materials, of Peace and War. So exquisite was the skill of the artist, so dazzling the garb in which the figure was presented, that it required the exercise of that cold, investigating faculty, which ought always to belong to those who sit on this bench, to discover its only imperfection,—its want of resemblance. The *Nereide* has not that Centaur-like appearance which has been ascribed to her. She does not rove over the ocean hurling the thunders of war while sheltered by the olive-branch of peace. She is not composed in part of the neutral character of Mr. Pinto, and in part of the hostile

character of her owner. She is an open and declared belligerent ; claiming all the rights and subject to all the dangers of the belligerent character. She conveys neutral property which does not engage in her war-like equipments, or in any employment she may make of them ; which is put on board solely for the purpose of transportation, and which encounters the hazard . . . of being taken into port, and obliged to seek another conveyance, should its carrier be captured. In this, it is the opinion of the majority of the Court, there is nothing unlawful. The characters of the vessel and cargo remain as distinct in this as in any other case."

From this conclusion Justices Story and Livingston dissented, the former, a master of prize law, delivering a very able, and, as has been thought by many, a very conclusive opinion. In a letter to a friend, written at the time, he remarks that never in his whole life was he more thoroughly satisfied that the judgment of the Court was wrong. In the case of the *Atalanta*<sup>1</sup> the same point was raised, and again argued, but the Court refused to reverse its doctrine, observing that the rule was correct—that enemy bottoms did not make enemy goods—and was the most liberal and honorable to the jurisprudence of this country. About the same time Sir Wm. Scott in the English High Court of Admiralty, held that though neutral property on board a merchant vessel of a belligerent was protected, yet if placed on an armed belligerent ship, it would be liable, on sound and just principles, to condemnation with the captured vessel.<sup>2</sup>

Another class of cases, few in number, arose, represented by *United States v. Crosby*,<sup>3</sup> by which it was decided that the title to land can be acquired and lost only in the manner prescribed by the law of the place where it is situated. In

<sup>1</sup> 3 Wheaton, 409 (1818).

<sup>2</sup> Case of the *Fanny*, 1 Dodson's Adm. Report, 443 (1814)

<sup>3</sup> 7 Cranch, 115 (1812).





Wm. Johnson

*Green v. Litter*,<sup>1</sup> which is interesting as a legal fossil, like the tooth of a mastodon in a hillside, it was held in an elaborate opinion by Story that whenever there exists a union of title and seisin in deed, either by actual entry and livery of seisin, or by intendment of law, as by conveyance under the Statute of Uses, the esplees are knit to the title, so as to enable the party to maintain a writ of right.

The cases just reviewed cover the period between Marshall's appearance on the bench in 1801 and 1815. During this time several changes had taken place in the personnel of the Court. Mr. Justice Moore had resigned, owing to ill health, and William Johnson, of South Carolina, was commissioned as his successor on the 26th of March, 1804.

Mr. Justice Johnson was born in Charleston, S. C., on the 27th of December, 1771. His father, who bore the same name, had removed from New York, and, according to Christopher Gadsden, was the first to set the ball of Revolution rolling in his adopted State. The family, though originally English, had removed to Holland after 1660, and some of its members, under the name of Jansen, settled in New Amsterdam. The future Justice was educated at Princeton and graduated in 1790, at the early age of nineteen with the highest honors of his class. He chose the law as his profession, and pursued his studies under the direction of Charles Cotesworth Pinckney. He was admitted to the bar in 1793, and soon rose to eminence. He was thrice elected to the Legislature of his native State, and during his last term served as Speaker of the House of Representatives. In a short time he became a judge of the Court of Common Pleas, and while in this position at the age of thirty-three was ap-

<sup>1</sup> 8 Cranch, 229 (1814).

pointed by Jefferson to the bench of the Supreme Court. His judicial service covered a period of thirty years. With Washington and Story he sat beside Marshall during the greater part of the latter's long term as Chief Justice. He had a strong mathematical head and considerable soundness of erudition, reminding Story of Jefferson's Attorney-General, Levi Lincoln, although with "less of metaphysics and more of logic." His tastes were quiet and unpretentious. His scholarship was marked, but his opinions vary much in character. Some of them, as his dissenting opinions in *Bollman* and *Swartwout*, and *Fletcher* and *Peck*, are strong and able, the latter containing the germ of that spirit of dissatisfaction with the doctrines of the *Dartmouth College* case which afterwards became common. Others are confused and wanting in exactness and precision, and indicate, as Mr. Shirley has observed, that the writer was unable to put his opinions on grounds satisfactory to himself. His legal instincts outran his powers of expression. Although originally an ardent supporter of Jefferson, he became involved in 1808 in a discussion with the Administration over his conduct as a Judge at Circuit. The collector of the port of Charleston, under the authority of the Embargo Act, and the direct instructions of the President, had refused clearances to several vessels, and on a motion for a mandamus, which was granted, the Judge undertook to comment on the illegality of the instructions. The matter was referred to Cæsar A. Rodney, then Attorney-General of the United States, who bitterly assailed the Judge, and warmly contended for the independence of the Executive. The Judge was provoked into a heated reply, which was widely published. His tendency upon Constitutional questions was that of mild Federalism; he rarely approved of the strong national views of Marshall, and shrunk

from the extreme views of Story. He stoutly resisted the extension of the admiralty jurisdiction so ably maintained and carried forward by the latter. But in the days of nullification, finding his sympathies strongly arrayed against those of a majority of his fellow-citizens, and believing that his judicial position required him to be neutral, he removed to Pennsylvania. In 1822 he attempted authorship and published the "Life and Correspondence of General Nathaniel Greene," in which he made an unfortunate attack upon the memory of James Wilson, an Associate Justice of the Supreme Court, charging him with complicity in the Conway Cabal for the removal of Washington and the substitution of Gates as Commander of the Army. The charge was completely disproved by papers in the possession of Judge Peters, of the United States District Court for Pennsylvania, and the venerable Bishop White,<sup>1</sup> and a public retraction was promptly made. He was the first to break in upon the practice, followed for many years, of permitting the Chief Justice to act as the organ of the Court, and restored the ancient habit of *seriatim* opinions, wherever there was any marked difference of judgment. The old system had given great dissatisfaction, as owing to the age and infirmities of Chase and Cushing, and the frequent absences of Todd, two judges sometimes practically became a majority of six, and three a majority of seven.<sup>2</sup>

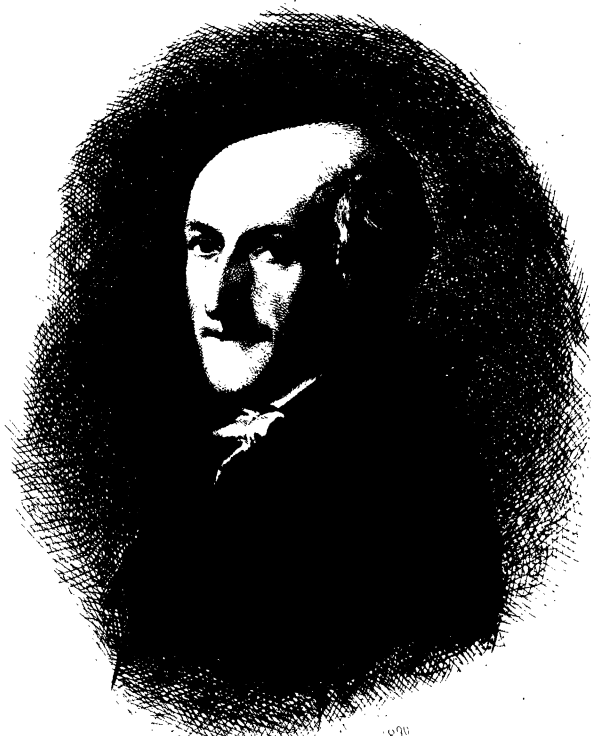
Mr. Justice Paterson died on the 9th of September, 1806, after a service of more than thirteen years, and on the 10th of November of the same year, Brockholst Livingston was commissioned in the recess, and recommissioned upon confirmation by the Senate on the 16th of January, 1807. He was

<sup>1</sup> Wilson Papers in Library of the Historical Society of Pennsylvania.

<sup>2</sup> John M. Shirley, "The Dartmouth College Cases," p. 311.

the son of Governor William Livingston, of New Jersey, and the brother of Robert R. Livingston, the Chancellor of New York, who administered the oath of office to George Washington as the First President of the United States. He was also the brother of Edward Livingston, the firm friend and famous Secretary of State of Andrew Jackson, and was the brother-in-law of John Jay. He was born in New York on the 25th of November, 1757, and was educated at Princeton, but before taking his degree joined the staff of General Schuyler in 1776. He attached himself subsequently to the suite of Arnold, with the rank of major, and shared in the capture of Burgoyne. He was promoted for good conduct to a colonelcy, but in 1779 abandoned military pursuits to accompany John Jay to Spain as private Secretary. On his return home he was captured by a British vessel and was thrown into prison, but secured his release upon the arrival of Sir Guy Carleton. In 1782 he devoted himself to the study of law under Peter Yates at Albany, and was admitted to the bar in the following year. He acquired a large practice and his name appears frequently in the earlier New York Reports. In 1802 he was appointed a *puisne* Judge of the Supreme Court of New York, of which Morgan Lewis was then Chief Justice, and Smith Thompson, James Kent and Ratcliffe *puisnes*. This place he held until his elevation to the Supreme Court of the United States. As a scholar he was intensely interested in historical studies, and was one of the first Vice-Presidents of the New York Historical Society. He was prominent also as one of the organizers of the public school system of New York. He had, said Story, "a fine Roman face; an aquiline nose, high forehead, bald head and projecting chin, indicating deep research, strength and quickness of mind." . . . "He evidently thinks with great solidity and seizes





Engraved by Albert Duerst 1870

W. Livingston



on the strong points of argument. He is luminous, decisive, earnest and impressive on the bench." As a judge he was candid and modest, learned, acute and discriminating. He devoted himself principally to maritime and commercial law, and his judgments were enhanced in value by the gravity and beauty of his judicial eloquence.

On the 24th of February, 1807, Congress authorized the appointment of an additional Associate Justice of the Supreme Court, to reside in the seventh Circuit, which was established for the Districts of Kentucky, Tennessee and Ohio. The Supreme Court was thus made to consist of a Chief Justice and six Associates. This act was in answer to the demands of the increasing business and population of the Western States, and the necessity of bringing to the deliberations of the Supreme Court some one well versed in the peculiar land laws of that vast region.

Thomas Todd, of Kentucky,<sup>1</sup> was duly nominated and confirmed for the place thus created, his commission being dated March 3, 1807. It is said that Jefferson, in making this selection, requested each member of Congress from the States composing the Circuit to communicate to him a nomination of their first and second choice. As the name of Todd appeared in every list he secured the appointment, although personally unknown to many of his supporters. He was born in Virginia, in King and Queen County, on the 23d of January, 1765. He lost his parents at a very early age, but was kindly provided for by his guardian, who afforded him an opportunity of acquiring a good English education with a little knowledge of the classics. While he was still a boy his guardian became embarrassed and he was thrown upon

<sup>1</sup> For much of the material relating to Judge Todd I am indebted to the Hon. H. I. Todd, of Frankfort, Ky.

his own resources. During the closing days of the war of the Revolution he was in the army, but upon receiving an invitation to become an inmate of the household of Hon. Henry Innes, a relative, he acquired a knowledge of surveying and book-keeping, and was remarkable for his accurate and methodical detail. In 1783 Judge Innes removed to Kentucky, and young Todd accompanied him, teaching the daughters of his friend by day, and prosecuting, at night, the study of the law by the light of the fire. He was soon admitted to practice and made his first effort at Madison old Court-House. His slender outfit at the beginning of the term consisted of his horse and saddle and thirty-seven and a half cents in money, but when the Court rose he had enough to meet his current expenses, and returned home with the bonds for two cows and calves, the usual fees of that day. From 1792 to 1801 he served as Clerk of the House of Representatives, and for a time was Clerk of the Federal Court for the District of Kentucky. On the erection of the State Government he was chosen Clerk of the Court of Appeals. In 1801 he was appointed one of the Judges of that Court, and in 1806, on the resignation of Judge Muter, became Chief Justice. He laid the foundation of the land laws of his State, and his perfect familiarity with questions of this character gave him a controlling influence with his brethren of the Supreme Court of the United States when considering claims such as that of The Holland Land Company. At the time of his appointment to the Supreme Court he was forty-two years of age. Patient and candid in investigation, clear and sagacious in judgment, with a just respect for authority, and at the same time, with well-settled views of his own as to the law; never affecting to possess that which he did not know, but with learning of a solid and useful cast, diffident



*Thomas Todd*







G. D. Walcott  
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and retiring in his habits, attentive to arguments, he won, says Mr. Justice Story, the enviable respect of his associates. Although bred in a different political school from that of Chief Justice Marshall, he steadfastly supported his Constitutional doctrines, and was warmly attached to the Union of the States.

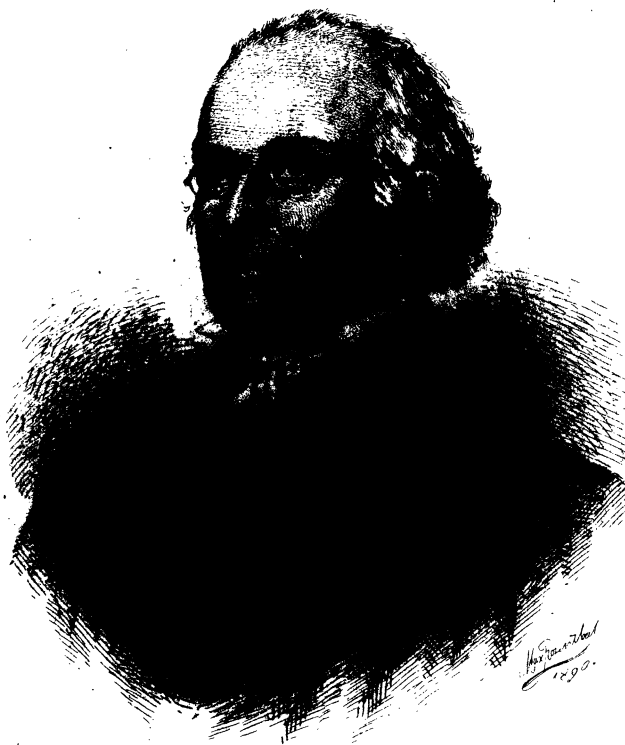
During the latter part of the year 1810 the venerable Associate Justices Chase and Cushing died. The place of the former was filled by Gabriel Duvall, of Maryland, and that of the latter by Joseph Story, of Massachusetts, their commissions being dated November 18, 1811. The place filled by Story had been offered in turn to Levi Lincoln and John Quincy Adams, both of Massachusetts. Commissions were regularly issued to both—on the 7th and 22d of January, 1811, respectively, but both had declined the post; one because of approaching blindness, the other because he preferred the Russian mission.

Gabriel Duvall was born in Prince George County, Maryland, on the 6th of December, 1752, and after receiving a classical education studied law, was admitted to the bar and soon became interested in political life. For many years he was clerk of the Maryland Legislature. He took no active part in public affairs during the Revolution, and his name, though well known and always respected, does not occur prominently. In fact he dwindles by the side of Chase, the mighty propagator. Although chosen as a member of the Federal Convention, for some reason he wholly ignored his appointment, and thus stripped himself by inaction of a claim which might have been his; to share in the glory which belongs to the framers of the Constitution of the United States. He was elected to the Congress of the United States in November, 1794, to fill a vacancy, and was re-elected, serving until March, 1796, when he resigned to take his place upon the bench of

the Supreme Court of Maryland. In December, 1802, he was appointed Comptroller of the Currency and held the office until the 18th of November, 1811, when he was appointed by President Madison an Associate Justice of the Supreme Court. His opinions as a Judge are not characterized by either remarkable learning or great reasoning powers, but are respectable. He was the only dissident in the Dartmouth College case. Owing to the infirmity of deafness he was compelled to resign his place in 1836.

Joseph Story, "the Lope de Vega or the Walter Scott of the Common Law," to whose vast professional labors even those of Coke and Eldon must yield in extent, whose name was as well known in Westminster Hall and in the Judicatories of Paris and Berlin as in the Courts of the United States, was one of the brightest ornaments of his profession and his age. Whatever judgment posterity may pass upon the value of his work as an author, it is certain that his labors at the side of Marshall in developing and expanding the principles of our national jurisprudence entitle him to the ceaseless gratitude of his countrymen. As a logician and a Constitutional judge he must yield to Marshall, whom he far surpassed in general legal scholarship, but as the rival of Stowell in admiralty and the peer of Kent in equity jurisprudence, as the sleepless and persistent force that urged others to the amendment and enlargement of our national code, as the Commentator upon the Constitution, as a teacher and law lecturer without an equal, as a judge urbane and benign, and as a man of spotless purity, he wrought so long, so indefatigably, and so well that he did more, perhaps, than any other man who ever sat upon the Supreme Bench to popularize the doctrines of that great tribunal and impress their importance and grandeur upon the public mind.





Joseph Henry

He was born at Marblehead, in the county of Essex, Massachusetts, on the 18th of September, 1779. His father, Elisha Story, was a native of Boston, and a sturdy Whig who had taken a very early and active part in all the Revolutionary movements, and who was one of the Indians who helped to destroy the tea in the famous Boston exploit. His mother, Mehitable Pedrick, was a woman of ardent temperament and admirable tact and method. After displaying some diligence at school and a disposition to scribble verses, young Story entered Harvard College, from which he graduated in 1798. Upon leaving Cambridge he immediately entered upon the study of the law in the office of Mr. Samuel Sewall, then a distinguished advocate at the Essex bar, a member of Congress, and afterwards Chief Justice of the Supreme Court of Massachusetts. For a time he dallied with the Muses, and seems to have left them with regret for the hard and forbidding features of the Common law. In 1801 he removed to Salem, and read with Judge Putnam, and in July was admitted to the Bar. At this time he was the only lawyer in his neighborhood who was either openly or secretly a Democrat. He found himself surrounded by Federalists, and encountered many discouraging obstacles to success. His industry and his exclusive devotion to his profession brought him clients and in the course of three or four years he could boast of a good business and an increasing reputation. In 1803 he declined the post of naval officer at the port of Salem, being persuaded that it would interfere with his prospects. In 1805 he was chosen a member of the Legislature, and supported several important measures with marked ability. Three years afterwards he was sent to Congress, and during his brief term of service distinguished himself in urging the repeal of the embargo and the augmentation of the navy. Declining re-election, he was

again chosen a member of the Legislature, and became Speaker of the House. His professional ability now won recognition, and in 1810 he argued before the Supreme Court of the United States the great case of the Georgia claim known as *Fletcher v. Peck*. About this time he edited a new edition of Chitty on Bills of Exchange and Promissory Notes, an American edition of Abbott on Shipping, and Lawes on Assumpsit. On the 18th of November, 1811, he was commissioned as an Associate Justice of the Supreme Court of the United States to fill the vacancy created by the death of Mr. Justice Cushing, who had occupied the place since the organization of the government. The appointment was a surprise, made, it seems, at the suggestion of Mr. Bacon, a member of Congress from Massachusetts. As the annual salary was then but three thousand five hundred dollars, its acceptance involved no slight pecuniary sacrifice. The opportunity of pursuing juridical studies, the high honor of the place, the permanence of the tenure, and the prospect of meeting the great men of the nation, were considerations which he could not resist.

Story was then but thirty-two years of age—the youngest judge, except Mr. Justice Buller, who was ever called to the highest judicial station either in England or America. His labors upon Circuit were onerous indeed, owing to the immense accumulation of business in consequence of the age and infirmities of his predecessor. The commercial and maritime interests of the New England States, and the large proportion of capital invested in shipping generated curious questions of admiralty law, respecting the rights, duties and liabilities of ship owners, mariners and material men, while controversies involving salvage and insurance arose from cases of wreck and loss upon those bleak and dangerous shores. In this way the attention of Judge Story was directed, at the

very outset of his judicial career, to questions of this character. He made himself a thorough master of this branch of jurisprudence as well as of Prize and Instance Law. From this day his labors in every field of legal science were tireless and unremitting. He soon interested himself in the reform of the criminal code of the United States, and sent to Mr. Pinkney sketches of improvements. He denounced the existing code as grossly and barbarously defective; the courts were crippled, and offenders, conspirators, and traitors were enabled to carry on their purposes almost without check. He begged his friends to induce Congress to give the Courts of the United States power to punish all crimes and offences against the Government, as at Common law. He pleaded for the extension of the national authority over the whole extent of power given by the Constitution; for great military and naval schools; an adequate regular army; a permanent navy; a national bank; a national system of bankruptcy; a great navigation act; a general survey of all our ports, and appointments of port wardens and pilots; courts which should embrace the whole Constitutional powers; national notaries; public and national justices of the peace, for the commercial and national concerns of the United States. By such enlarged and liberal institutions, he argued, the Government of the United States would become endeared to the people, and the factions of the great States be rendered harmless. The possibility of a division would be prevented by creating great national interests which would bind us in an indissoluble chain. He delivered eulogies, and historical and literary addresses; published several volumes of reports of his decisions at Circuit; drafted a Bankrupt law, the Crimes Act, a Judiciary Act, and wrote for the use of a friend in Congress an argumentative comment thereon. He wrote elaborate notes for Mr. Wheaton: "On the

Principles and Practice of Prize Courts," "On Charitable Bequests," "On the Patent Laws," "On Piracies," "On the Admiralty Jurisdiction," "On the Rule of 1756," and prepared a large portion of a Digest. He edited an edition of the Laws of the United States, contributed articles to "The American Jurist," reviewed books and professional treatises, corresponded with Lord Stowell, Lord Eldon, Sir James Mackintosh, Chancellor Kent, and most of the public men of his day; published verses; founded a Law School; surrendered his library to Harvard; lectured upon Equity, Equity Pleading, Commercial and Constitutional law; published treatises upon a dozen different subjects, which have become standard authorities in England as well as in this country; wrote the ablest work extant on the "Conflict of Laws;" declined the Chief Justiceship of Massachusetts, and at the same time did his fair share of the labors of the Supreme Court, as attested by more than thirty-five volumes of Reports. His mental activity was ceaseless, and as a Judge, author and teacher of Jurisprudence, he exercised in each of these characters a peculiar influence. He became a jurist of world-wide reputation, and the echoes of his fame returned to his native shores from those of England, France, Germany, Italy, Russia and Spain. As familiar with Justinian as with Coke, he swept the bounds of jurisprudence with comprehensive glance, and poured forth the rich accumulations of his industry with flowing pen. His position in legal literature is unique, and the impression he made upon his contemporaries was profound. Yet it may be doubted whether his reputation will stand the test of time. "His power of synthesis," writes a most competent critic, "was considerable; but when you have heard his opinions and text books dissected by analytical men at the bar as often as I have, you will come to the conclusion that his mind was de-



ficient in accuracy, that its discipline was not strict, nor its investigations patient. His reputation, which was in a good degree a reflected one from England, where he took great pains to make himself known, has not, I think, stood firm in the professional mind to this day. And I much doubt whether he had any accurate knowledge of the Civil law.”<sup>1</sup> Another writer says: “Whole chapters of some of his books seem to be little more than windrows of head notes, raked together as the farmer rakes his hay in the mow field; but when we survey the ground, the wonder is, not that they contain so many imperfections, but that his work was so well performed. His opinions will probably stand higher in the hereafter than his text books, except his works on ‘The Conflict of Laws’ and the ‘Constitution.’”<sup>2</sup>

A glance at the bar of the Supreme Court may be permitted. The earliest sessions of the Court had been held in an upper room in the Exchange, New York. No arguments were made there; but on the removal of the seat of Government to Philadelphia, where the Court sat for ten years—from 1791 to 1801—its sessions were held in the South Chamber, up-stairs, of the City Hall, at the corner of Fifth and Chestnut Streets.<sup>3</sup> Here Edmund Randolph, William Bradford and Charles Lee appeared as Attorney-Generals of the United States, with Alexander Hamilton, John Marshall, Alexander Campbell, James Innes, John Wickham and Thomas Swann as opponents, and all the active practitioners of the Philadelphia Bar. When the Court

<sup>1</sup> Letter of John William Wallace, Esq., Reporter of the Supreme Court of the United States, to the writer, January 31st, 1876.

<sup>2</sup> John M. Shirley, “Dartmouth College Causes,” p. 330.

<sup>3</sup> Discourse of John Wm. Wallace, Esq., before the Historical Society of Pennsylvania, 1872.

removed to Washington, the leaders of the old Bar of Philadelphia followed, and maintained their ascendancy: the eloquent Dallas, the accomplished Rawle, the rough and rugged Lewis; the elder Tilghman and the elder Ingersoll,—the former, strong, pointed and logical; the latter, a perfect dragnet in the law. "My bar," as Judge Washington affectionately called them, as they entered the room in a body, after four days of tedious and dangerous riding in the middle of February, over rough roads.

We catch delightful glimpses of the olden days and vanished states of society in the reminiscences of Peter S. Duponceau, himself one of that famous band, as he describes how they all went down together to argue the causes arising out of the British Orders in Council and the Berlin and Milan decrees; how these grave counsellors, as soon as they were out of the city and felt the flush of air, acted like schoolboys on a holiday; how flashes of wit shot their coruscations on all sides; how puns of the genuine Philadelphia stamp were bandied about, and old college stories were revived; how macaronic Latin was spoken, and songs were sung, among which was the famous Bacchanalian of the archdeacon of Oxford: *Mihi est propositum in taberna mori*.<sup>1</sup> In Washington they met Charles Lee, "whom no one would suspect of having been Attorney-General;" Harper, graceful and flowing, though somewhat artificial; Key, Swann and Martin, of Maryland—"that singular compound of strange qualities, whom you should hear of, but should not see,"—Jeremiah Mason, and John Quincy Adams, rugged and strong, and Dexter, relying upon the deliberate suggestions of his own mind, and finding himself supported by the authority of

<sup>1</sup> P. S. Duponceau, "A Memoir of William Rawle." *Memoirs of the Historical Society of Pennsylvania*, Vol. IV., p. 95.

Mansfield when he least suspected it. A younger generation soon succeeded, and in the room which now serves as the law library of Congress—a basement chamber approached by a small hall, having an eastern door of entrance from the grounds of the Capitol, flanked by pillars of novel design of Indian-corn stalks with ears half open at the top,—a room spared by the conflagration kindled in 1814 by British soldiers,—sat the most august tribunal of the land hearing solemn argument. In “this cave of Trophonius,” as John Randolph spitefully called it, John Marshall sat for thirty-four years, in the midst of six Associates, listening to the most profound and brilliant arguments from Pinkney, foppish, vehement, overwhelming, but always well prepared; Wirt, florid and classical, but of considerable legal attainments; Emmett, the interesting exile; Binney, the consummate lawyer; Clay, dashing and magnetic, and Webster, inspiring and profound. Such are the associations of this unimposing chamber; and while wandering beneath its solemn arches, and recalling the mighty figures of the heroic past who there labored for the establishment of a national Constitutional government, the visitor cannot fail to yield to emotions of awe, while in the holiest, but now abandoned sanctuary of Justice, upon whose altars once burned “the gladsome light of jurisprudence.”

## CHAPTER XIV.

THE THIRD EPOCH: 1816-1835: THE LATTER HALF OF MARSHALL'S CAREER: THE GOLDEN AGE OF THE SUPREME COURT: APPELLATE JURISDICTION OF THE SUPREME COURT UNDER THE 25TH SECTION OF THE JUDICIARY ACT: MARTIN *v.* HUNTER'S LESSEE: COHENS *v.* STATE OF VIRGINIA: THE TERM OF 1819: M'CULLOCH *v.* STATE OF MARYLAND: TRUSTEES OF DARTMOUTH COLLEGE *v.* WOODWARD: STURGES *v.* CROWNINSHIELD: OSBORN *v.* BANK OF THE UNITED STATES: POWER OF CONGRESS TO REGULATE COMMERCE: GIBBONS *v.* OGDEN: WILSON *v.* BLACKBIRD CREEK MARSH CO: BROWN *v.* STATE OF MARYLAND: CONSTITUTIONAL RESTRICTIONS UPON THE POWERS OF THE STATES: CRAIG *v.* STATE OF MISSOURI: POSITION AND INFLUENCE OF THE SUPREME COURT: RIGHTS OF THE STATES: PROVIDENCE BANK *v.* BILLINGS: BARRON *v.* MAYOR OF BALTIMORE: POWERS OF STATES TO PASS BANKRUPT LAWS: OGDEN *v.* SAUNDERS: BOYLE *v.* ZACHARIE: WHAT CONSTITUTES A STATE: CHEROKEE NATION *v.* STATE OF GEORGIA: WORCESTER *v.* STATE OF GEORGIA: LAST CONSTITUTIONAL DECISION OF MARSHALL: PRINCIPLES OF CONSTITUTIONAL INTERPRETATION: SKETCHES OF JUSTICES THOMPSON, TRIMBLE, MCLEAN, BALDWIN AND WAYNE: GENERAL REVIEW OF THE WORK ACCOMPLISHED BY THE SUPREME COURT UNDER MARSHALL.

IN the last chapter we reached a period which marks the termination of the first half of Marshall's judicial career.

Beneath the strong and steady rays cast by his mind the mists were rising, and the bold outlines of our national system were gradually revealed. To keen eyes the destination of the Ship of State was visible, although from most men still concealed by haze. Greater questions than any yet determined were to be met. The decisive battle for national sovereignty was still to be fought. The true method of interpreting the Constitution was still unsettled. Whether the right of Congress to pass all laws "necessary and proper" for the Federal government was not restricted to such as were indispensable to that end; whether the right of taxation could

be exercised by a State against creations of the Federal Government; whether a Federal Court could revise the judgment of a State Court in a case arising under the Constitution and laws of the United States; whether the officers of the Federal Government could be protected against State interference; how far a State could impair the obligation of a charter; how far extended the power of Congress to regulate commerce among the States; how far to regulate foreign commerce as against State enactment; how far extended the prohibition to States against emitting bills of credit—these and like questions were awaiting consideration by the master mind. In this wide realm he was to be crowned as sovereign. And for the Court, there lay before it the universal empire of jurisprudence; the ancient and subtle learning of the law of real estate; the criminal law; the niceties of special pleading; the refined doctrines of contracts; the enlightened system of commercial and maritime law; the principles and practice of admiralty and prize; the immense range of chancery; the ever spreading bounds of jurisdiction over patents, copyrights and trademarks; and that higher region, rising into noble eminences, from which wide views could be obtained of the great themes of public, international and constitutional law—these fields though already entered upon were still to be subdued. With Marshall, Story and Washington upon the bench as a triumvirate, whose policy was harmonious and steadfast; with Johnson, Livingston, Todd and Duvall as intelligent advisers and critics; with men at the bar of the expansive power and propulsive energy of Pinkney and Webster, roused to the noblest exertions of their genius by the rivalry of Wirt, Emmett, Dexter and Jones, the labor of building up our Constitutional jurisprudence and of establishing its national character was carried forward by the wisest

heads, the most sagacious judgments and the most patriotic hearts. In a moment of inspired prophecy, Pinkney exclaimed: "I meditate with exultation, not fear, upon the proud spectacle of a peaceful judicial review of these conflicting sovereign claims by this more than Amphictyonic Council. I see in it a pledge of the immortality of the Union, of a perpetuity of national strength and glory increasing and brightening with age,—of concord at home and reputation abroad." It was an age of great arguments at the bar, and great opinions from the bench. There were time and opportunity for both. The mercantile necessities of the people had not yet compelled the use by *Judex* of an hour-glass, nor the substitution of citations of the latest authorities for a discussion of principles. Dialectics might still be wedded unto Fancy; and neither was doomed to celibacy. Every argument was alive and in motion—the statue of Pygmalion inspired with vitality. It was the Golden Age of the Supreme Court.

A succession of great questions arose. In 1816 a most important matter called for determination, presenting an instance of collision between the judicial powers of the Union, and one of the greatest States on a point the most delicate and difficult to be adjusted. The Constitution of the United States had not in terms granted to the Supreme Court appellate power over courts of the States, and although silently acquiesced in at an early day, this jurisdiction was finally not only seriously questioned but absolutely denied by the State of Virginia. It required a repetition of instances, in which the Supreme Court vindicated its authority within certain well-defined limits, to convince the country that this power existed.<sup>1</sup>

<sup>1</sup> Curtis, "Jurisdiction of the United States Courts," pp. 26-27. See also *Gelston v. Hoyt*, 3 Wheaton, 246 (1818), and *Houston v. Moore*, *Ibid.*, 433 (1818), for

The 25th section of the Judiciary Act of 1789 had provided that—

“A final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of such their validity; or where is drawn in question the construction of any clause of the Constitution, or of a treaty or statute of, or commission held under the United States, and the decision is against the title, right, privilege, or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission,—may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error.”<sup>1</sup>

This Act was a triumph of Federalist centralization, and was a cession of power to the Supreme Court of more consequence to the States than the “necessary and proper” clause itself. Its critics believed that it had been dictated by a wish to make the State judiciaries inferior courts of the central government, because the powers of the General Government might be ‘drawn in question’ in many ways and on many occasions. Mr. Henry Adams asserts that Chief Justice Marshall achieved one of his greatest victories by causing Justice Story, a Republican, raised to the Bench in 1811 for the purpose of contesting his authority, to pronounce the opinion of the Court in the case of *Martin v. Hunter’s Lessee*,<sup>2</sup> by which the position of the Virginia Court of Appeals was overruled

instances of acquiescence of the States in the appellate power of the Supreme Court under the 25th Section of the Judiciary Act.

<sup>1</sup> Act 24th of September, 1789, 1 United States Statutes at Large, p. 85.

<sup>2</sup> 1. Wheaton, 304 (1816).

upon the question of constitutionality raised by the State Court in regard to this section of the Judiciary Act.<sup>1</sup>

The case was argued on the one side by Walter Jones, who maintained for many years a proud pre-eminence at the bar of the District Court of Columbia, and on the other by Tucker, of Virginia, and Dexter, of Massachusetts; Dexter, while conceding that he had long inclined to the belief that the Government was not strong enough and that the centrifugal force was greater than the centripetal, asserted that he would not strain or break the Constitution itself in order to establish a national power. The opinion of Mr. Justice Story, which is the first Constitutional judgment ever delivered by him, differs from most of his opinions in the fact that it is a closely-reasoned argument without the citation of authority. It displays many of the peculiar merits of the best judgments of Marshall, compactness of fibre and closeness of logic. It develops the relations of the States to the Federal government, and establishes that although their sovereign authority is only impaired so far as it is ceded, yet that the Constitution does not operate to create a mere confederation and aggregation of separate sovereignties, but contains in itself paramount and supreme powers surrendered by the States and the people for the common and equal benefit of all over whom this government extends,—and that among the powers thus ceded is the appellate jurisdiction of the Supreme Court over all cases enumerated in the clause vesting the judicial power.

“The appellate power,” said he, “is not limited by the terms of the third article to any particular Courts. The words are,—‘The judicial power’ (which includes appellate power) ‘shall extend to all cases,’ etc., ‘and in all other cases before mentioned, the Supreme

<sup>1</sup>See Adams's “History of the United States,” Vol. I, p. 260.



Court shall have appellate jurisdiction.' It is the case, then, and not the Court, that gives the jurisdiction. If the judicial power extends to the case, it will be in vain to search in the letter of the Constitution for any qualification as to the tribunal where it depends. It is incumbent, then, upon those who assert such a qualification to show its existence by necessary implication. If the text be clear and distinct, no restriction upon its plain and obvious import ought to be admitted, unless the inference be irresistible. If the Constitution meant to limit the appellate jurisdiction to cases pending in the Courts of the United States, it would necessarily follow that the jurisdiction of these Courts would, in all the cases enumerated in the Constitution, be exclusive of State tribunals. How otherwise could the jurisdiction extend to all cases arising under the Constitution, laws and treaties of the United States, or to all cases of admiralty and maritime jurisdiction? If some of these cases might be entertained by State tribunals, and no appellate jurisdiction as to them should exist, then the appellate power would not extend to all, but to some cases. If State tribunals might exercise concurrent jurisdiction over all or some of the other class of cases in the Constitution without control, then the appellate jurisdiction of the United States might, as to such cases, have no real existence, contrary to the manifest intent of the Constitution. Under such circumstances, to give effect to the judicial power, it must be construed to be exclusive, and this not only when the *casus fæderis* should arise directly, but when it should arise incidentally in cases pending in State Courts."

From this reasoning Mr. Justice Johnson dissented, viewing the question as one of the most momentous importance, and quoting with approval the language of Patrick Henry: "I rejoice that Virginia has resisted." He concurred in the result, however, and exerted himself most ingeniously to save the State from any sense of humiliation.

The entire subject, though fully discussed by Mr. Justice Story, was not finally settled until the case of *Cohens v. The State of Virginia*,<sup>1</sup> in which the Supreme Court, with

<sup>1</sup> 6 Wheaton, 264 (1821).

decisive effect, and in a manner which has always been acquiesced in by the country since that time, vindicated and sustained its jurisdiction. A complete view of the nature of the judicial powers of the Federal Government is to be obtained by reading, in this connection, the opinion of the Chief Justice in the case of the *Bank of Hamilton v. Dudley's Lessees*,<sup>1</sup> in which it was held that the State Courts have exclusive power to construe the Constitution and legislative acts of their respective States. "The judicial department of every government," said he, "is the rightful expositor of its laws, and emphatically of its supreme law."

The term of 1819 became distinguished in the annals of the Court not alone by the importance of the causes which came before it relating to the general business interests of the country, but by the occurrence of several cases of more than ordinary gravity as connected with the political affairs of the nation. The principles discussed were of the most momentous character, and the decisions announced were destined to guide and control the most distant posterity. At this time Mr. Monroe was President; the fierce heat of party passion had cooled; it was an era of good feeling. The Court had become the centre of observation for its august power, dignity and public trust. It was no longer an unknown or an untried tribunal. It had become well established. Marshall had been Chief Justice for eighteen years; Washington had been on the bench for twenty-one years, Johnson for fifteen, Livingston and Todd for twelve, Story and Duvall for eight; all had won for themselves and for the court a distinctive position of eminence and influence. Whatever determinations they might reach would carry great

<sup>1</sup> 2 Peters, 492 (1829).

weight. The bar, too, had won a position of authority. Wirt as Attorney-General, and Pinkney as an ex-Attorney-General had now ascended to the highest levels of their professional careers; Martin had just begun to lag superfluous on the stage, but Jones, Hopkinson and Webster were fast approaching the zenith of their fame as advocates. Diligent study, solid accumulations of strength, long experience, varied knowledge, a widely extended reputation for eloquence and logic, kindled moreover by intense personal rivalry, and a cheerful but sanguine ambition—these were sufficient to produce at the bar arguments distinguished for perspicacity, comprehensive and philosophic views of every subject, and the most convincing power of demonstration.

The first case to arise was that of *M'Culloch v. The State of Maryland*<sup>1</sup> involving the double question of the constitutionality of the act incorporating the Bank of the United States, and of the power of a State to tax an agency of the general Government.

Congress, by an Act passed in April, 1816, had incorporated the Bank of the United States, which had been originally established under an Act of 1791, but whose charter had expired in 1811. A branch of this Bank was established at Baltimore, and in 1818 the Legislature of Maryland imposed a stamp duty on the circulating notes of all banks or branches thereof, located in that State, not chartered by the Legislature. The Maryland Branch refused to pay the tax, and M'Culloch, the Cashier, was sued for it. Judgment was recovered against him in the State Court, and he carried it, on writ of error, to the Supreme Court. The decision of the appellate tribunal was looked for with eager interest.

<sup>1</sup>4 Wheaton, 316 (1819).

Pinkney, Wirt and Webster appeared for the Bank, and Martin, Hopkinson and Jones for the State. "I never in my whole life," says Judge Story, in writing of Pinkney's effort, "heard a greater speech. It was worth a journey from Salem to hear it. His elocution was excessively vehement, but his eloquence was overwhelming. His language, his style, his figures, his arguments were most brilliant and sparkling. He spoke like a great statesman and patriot, and a sound Constitutional lawyer. All the cobwebs of sophistry and metaphysics about State rights and State sovereignty he brushed away as with a mighty besom."<sup>1</sup>

It was in the course of his argument that Pinkney exclaimed: "I have a deep and awful conviction that upon that judgment it will depend mainly whether the Constitution under which we live and prosper is to be considered like its precursor, a mere phantom of political power, to deceive and mock us—a pageant of mimic sovereignty calculated to raise up hopes that it may leave them to perish—a frail and tottering edifice that can afford no shelter from storm, either foreign or domestic—a creature half made up, without heart or brain, or nerve, or muscle,—without protecting power or redeeming energy—or whether it is to be viewed as a competent guardian of all that is dear to us as a nation."<sup>2</sup>

The institution of a national bank, as being of primary importance to the prosperous administration of the finances, and of the greatest utility in the operations connected with the support of public credit, had been recommended originally by Alexander Hamilton as Secretary of the Treasury. The constitutionality of the exercise of such a power had been debated with extraordinary ability in both houses of Congress, and in

<sup>1</sup> Story's *Life and Letters*, Vol. I, p. 325.

<sup>2</sup> Wheaton's "*Life of Pinkney*," pp. 163-166.

the Executive Cabinet, where Jefferson, as Secretary of State, and Randolph, as Attorney-General, had declared that they saw no warrant in the language of the Constitution, even under the clause relating to incidental powers, for such a corporation. The opposite view was maintained by Hamilton, with overwhelming ability and ardor, and prevailed with Washington. The question, therefore, was not new to the thoughts of the nation, and counsel at the bar availed themselves of all that had been previously said and written upon the subject.

The opinion delivered by Marshall has always been considered as one of the most elaborate and masterly of his efforts, and Chancellor Kent<sup>1</sup> has said that a case could not be selected superior to this for the clear and satisfactory manner in which the supremacy of the laws of the Union have been maintained by the Court, and an undue assertion of State power overruled and defeated. A close observer of Marshall's language cannot fail to remark that much is borrowed from Hamilton. In considering the extent of the "necessary and proper" clause in the Constitution, the Chief Justice said:

"We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended; but we think a sound construction of the Constitution must allow to the national legislature that discretion with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

This language was in harmony with that which had been used some years before in the case of the *United States v.*

<sup>1</sup> Kent's Commentaries, 428.

*Fisher*.<sup>1</sup> At the same time an expression was added of the unwillingness of the Court to assume any power to pass upon the expediency of the exercise of the power conferred upon Congress.

"Where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread upon legislative ground. The Court disclaims all pretensions to such a power."

In dealing with the power of a State to tax an agency of the national government, he made it clear:

"That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create. . . . If the States may tax one instrument employed by the Government in the execution of its power, they may tax any and every other instrument; they may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the Custom House; they may tax judicial process; they may tax all the means employed by the Government to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make the Government dependent on the States . . . The question is, in truth, a question of supremacy, and if the right of the States to tax the means employed by the General Government be conceded, the declaration that the Constitution and the laws made in pursuance thereof shall be the supreme law of the land is empty and unmeaning declamation."<sup>2</sup>

The famous case of the *Trustees of Dartmouth College v. Woodward*<sup>3</sup> also came before the Court at this term, estab-

<sup>1</sup> 2 Cranch, 358 (1805).

<sup>2</sup> The same conclusion was reached in *Osborn v. Bank of the United States*, 9 Wheaton, 738 (1824), in which the State of Ohio imposed an annual tax of \$50,000 upon each office of discount and deposit maintained by that Bank in the State, and *Weston v. Charleston*, 2 Peters, 449 (1829), in which a municipal tax was imposed upon stocks of the United States owned by citizens of Charleston, S. C.

<sup>3</sup> 4 Wheaton, 518 (1819).

lishing the inviolability of charters and their protection by the power of the Federal Government, and is perhaps better known to laymen, both in name and in principle, than any other decision of the Court. The tide of national power was rising fast, and each successive billow marked a higher line upon the beach. Of this case, containing one of the most celebrated of Marshall's judgments, Mr. Binney says: "If I were to select, in any particular, from the mass of judgments for the purpose of showing what we derived from the Constitution, and from the noble faculties which have been applied to its interpretation, it would be that in which the protection of chartered rights has been deduced from its provisions. The case of Dartmouth College is the bulwark of our incorporated institutions for public education, and of those chartered endowments for diffusive public charity which are not only the ornaments, but among the strongest defences of a nation."<sup>1</sup> And Mr. Justice Miller has said: "It may well be doubted whether any decision ever delivered by any Court has had such a pervading operation and influence in controlling legislation as this. The legislation, however, so controlled, has been that of the States of the Union."<sup>2</sup>

The case has been the subject of much criticism, and has provoked much dissatisfaction as well as praise and admiration. The actual controversy, as the Chief Justice himself remarked, turned upon the question whether the charter of the College was a grant of political power which the State could resume or modify at pleasure, or a contract for the security and disposition of property bestowed in trust for

<sup>1</sup> An Eulogy on the Life and Character of John Marshall, delivered at the request of the Councils of Philadelphia, on the 24th of Sept., 1835, by Horace Binney.

<sup>2</sup> An Address delivered before the Alumni Society of the Law Department of the University of Michigan on the Supreme Court of United States, June 29, 1887.

charitable purposes. It was held to be the latter, and for that reason inviolable under Section 10 of Article I of the Constitution, which declares that—"No State shall make any law impairing the obligation of contracts."

The main stress of adverse criticism is upon the point that the corporation existed under a charter granted by the British Crown to its Trustees in New Hampshire in the year 1769. It was, therefore, a royal charter, and not a legislative grant.<sup>1</sup>

The Charter conferred upon the trustees the entire governing power of the College, and among others that of filling all vacancies occurring in their own body, and of removing and appointing tutors. It also declared that the number of trustees should forever consist of twelve, and no more. After the Revolution, the Legislature of New Hampshire passed a law to amend the charter, to improve and enlarge the corporation, to increase the number of trustees, giving the appointment of the additional members to the Governor of the State, and creating a Board of Overseers of twenty-five persons, of whom twenty-one were also to be appointed by the Governor. These overseers had power to inspect and control the most important acts of the trustees.

The opinion, to which there was but one dissent—that of Mr. Justice Duvall—establishes the doctrine that the act of a government, whether it be an act of the Legislature or of the Crown which creates a corporation, is a contract between the State and the corporation, and that all the essential franchises, powers and benefits conferred by the charter become, when accepted by the corporation, contracts within the meaning of the Constitutional clause.

<sup>1</sup> John M. Shirley, "The Dartmouth College Causes and the Supreme Court."



"This is plainly a contract," said Marshall, "to which the donors, the trustees and the crown (to whose rights and obligations New Hampshire succeeds) were the original parties. It is a contract for the security and disposition of property. It is a contract on the faith of which real and personal estate has been conveyed to the corporation. It is then a contract within the letter of the Constitution and within its spirit also, unless the fact that the property is invested by the donors and trustees for the promotion of religion and education, for the benefit of persons who are perpetually changing, though the objects remain the same, shall create a particular exception, taking this case out of the prohibition contained in the Constitution. . . . On what safe and intelligible ground can this exception stand? There is no expression in the Constitution, no sentiment delivered by its cotemporaneous exponents which would justify us in making it. In the absence of all authority of this kind, is there, in the nature and reason of the case itself, that which would constrain a construction of the Constitution not warranted by its words? Are contracts of this description of a character to excite so little interest that we must exclude them from the provisions of the Constitution as being unworthy of the attention of those who framed the instrument, or does public policy so imperiously demand their remaining exposed to legislative alteration as to compel us, or rather permit us to say that these words which were introduced to give stability to contracts, and which in their plain import comprehend this contract, must yet be so construed as to exclude it?"

In this reasoning Justices Washington and Story concurred in separate opinions, Justice Johnson in the reasons stated by the Chief Justice, while Justice Livingston concurred in the reasons stated by all.

The opinion of Mr. Justice Story was one of the most learned and able of his efforts, containing a most elaborate and exhaustive review of English and American decisions upon the nature of charities and of the power of visitation. In conclusion he says:

"In my judgment it is perfectly clear that any act of a legislature which takes away any power or franchise vested by its charter in a pri-

vate corporation, or its corporate officers, or which restrains or controls the legitimate exercise of them, or transfers them to other persons without its assent, is a violation of the obligations of that charter. If the Legislature mean to claim such an authority, it must be reserved in the grant."

It is true that the Supreme Court, as will be seen, has been compelled, of late years, to insist upon the existence of an express contract by the State with a corporation, when relief is sought against subsequent legislation, in order to guard against the evils flowing from too sweeping an abdication of sovereign powers by implication. But the main feature of the case remains, and probably will remain, that a State can make a contract by legislation, and that in such a case no subsequent legislative act can interpose any effectual barrier to its enforcement. The result of this principle has been to make void innumerable acts of State Legislatures intended, in times of disastrous financial depression and suffering, to protect the people from the hardships of a rigid enforcement of their contracts, and to prevent States from impairing, by legislation, contracts entered into with other parties. The decision has stood as a great bulwark against popular efforts, through State legislation, to avoid the payment of just debts, and the general repudiation of the rights of creditors.<sup>1</sup>

The same question recurred in *Green v. Biddle*,<sup>2</sup> where it was held that the Constitutional prohibition embraced all contracts, executed or executory, between private individuals, or a State and individuals, or corporations, or between the States themselves, the main question being that a compact between two States was a contract entitled to protection. An-

<sup>1</sup> Mr. Justice Miller's Address, *ut supra*.

<sup>2</sup> 8 Wheaton, 1 (1823).

other aspect of the same controversy was considered in the case of *Sturges v. Crowninshield*,<sup>1</sup> in which the power of the States to pass bankrupt laws was exhaustively considered, and it was held that a State has full authority to pass such a law until Congress has acted on the subject, provided such State law does not impair the obligation of contracts by discharging the debtor.

The particular act, the Constitutionality of which was assailed in this case, was held to be void, inasmuch as it not only liberated the person of the debtor, but discharged him from all liability for any debt contracted previous to his discharge upon surrender of his property, and was, therefore, held to be a law impairing the obligation of contracts within the meaning of the Constitutional clause. At the same time the Chief Justice was careful to draw the distinction which exists, and has been recognized ever since, between the obligation of a contract and the remedy given by the Legislature, and it was held that so long as the former exists unimpaired, the latter may be modified as the wisdom of the Legislature shall direct.

In the great case of *Cohens v. Virginia*<sup>2</sup> the Chief Justice had an opportunity of again asserting the supremacy of the Federal judiciary over State Courts under the 25th section of the Judiciary Act, and of interpreting the Eleventh Amendment, which had forbidden suits against a State by citizens of another State. The Cohens had undertaken to sell lottery tickets in Virginia, under the authority of an Act of Congress establishing a lottery in the District of Columbia for national purposes. They were indicted under a State statute, making the selling of lottery tickets an offence. They were convicted

<sup>1</sup> 4 Wheaton, 122 (1819). See also *McMillan v. McNeill*, *Ibid.*, 209 (1819). *Farmers and Mechanics' Bank of Pennsylvania v. Smith*, 6 Wheaton, 131 (1821).

<sup>2</sup> 6 Wheaton, 264 (1821).

and fined, and the lower Court was of opinion that they had exclusive jurisdiction of the case.

In overruling the judgment, upon the point of jurisdiction, the Chief Justice pointed out that this was not a suit against the State of Virginia, but a prosecution by the State to which a defence under the laws of the United States had been set up, and that the writ of error merely removed the record for the purpose of enabling the supreme tribunal of the nation to re-examine the Constitutional question involved. He impaled the argument of counsel for the State, by reducing their propositions to manifest absurdities. Thus he said:

“They maintain that the nation does not possess a department capable of restraining peaceably and by authority of law any attempts which may be made by a part against the legitimate powers of the whole; and that the government is reduced to the alternative of submitting to such attempts or of resisting them by force. They maintain that the Constitution of the United States has provided no tribunal for the final construction of itself, or of the laws or treaties of the nation, but that this power may be exercised in the last resort by the Courts of every State in the Union. That the Constitution, laws and treaties may receive as many constructions as there are States, and that this is not a mischief, or if a mischief, is irremediable.”

To these propositions there could be but one answer. He sustained the conviction, however, on the ground that the Act of Congress did not authorize a violation of the criminal laws of the State.

In the case of *Osborn v. The Bank of the United States*<sup>1</sup> the Eleventh Amendment was again fully considered, and it was held that the criterion of a suit against a State was whether the State was a party to the record, on the ground that if the jurisdiction were held to depend, not upon that plain fact, but

<sup>1</sup> 9 Wheaton, 739 (1824).

upon the supposed or actual interest of the State in the result of the controversy, no rule was given by the Constitution by which that interest could be measured.<sup>1</sup>

A case now arose of the greatest importance and of the most lasting consequences, which gained great celebrity, and determined for the first time the true construction of the powers of Congress to regulate commerce among the several States. It is known as *Gibbons v. Ogden*.<sup>2</sup> An injunction had been granted by Chancellor Kent, which was sustained by the highest Appellate Court in New York, restraining Gibbons from navigating the Hudson River by steamboats duly licensed for the coasting trade under an act of Congress, on the ground that he was thereby infringing the exclusive right granted by the State of New York to Robert Fulton and Livingston, and by them assigned to Ogden to navigate all the waters of that State with vessels moved by steam. The decision of the lower Court rested upon the doctrine that the internal commerce of the State by land and water remained entirely and exclusively within the scope of its original authority, and that the coasting license, while giving to the steamboat an American character for the purpose of revenue, was not intended to confer a right of property, or a right of navigation or commerce. "To-morrow week," wrote Wirt to a friend, "will come on the great steamboat question from New York. Emmett and Oakley on one side, Webster and myself on the other. Come down and hear it. Emmett's whole soul is in the case, and he will stretch all his powers. Oakley is said to be one of the first logicians of the age; as much a Phocion as Emmett is a Themistocles, and Webster is as am-

<sup>1</sup> Henry Hitchcock, LL.D., "Constitutional Development in the United States as Influenced by Chief Justice Marshall."

<sup>2</sup> 9 Wheaton, 1 (1824).

bitious as Cæsar. He will not be outdone by any man if it is within the compass of his power to avoid it. It will be a combat worth witnessing."<sup>1</sup>

The proposition contended for was that Congress had exclusive authority to regulate commerce in all its forms, on all the navigable waters of the United States, their bays, rivers and harbors, without any monopoly, restraint or interference created by State legislation. This the Supreme Court sustained in an opinion of great length. In construing the power to regulate commerce, it was held that the term meant, not only traffic, but intercourse, and that it included navigation, and the power to regulate commerce was a power to regulate navigation. Commerce among the several States meant commerce intermingled with the States, and which might pass the external boundary line of each State and be introduced into the interior. It was admitted that it did not extend to commerce which was purely internal, carried on between different parts of the same State, but in the case at bar it was held that the statute on the part of the State was an exercise of the power of regulating commerce among the States which had been confided to Congress by the Constitution, and that inasmuch as Congress had passed laws authorizing the licensing of vessels for the coasting trade, which authorized them to navigate all the waters within the jurisdiction of the United States capable of being used for that purpose, this act was an exercise of the power conferred by the clause of the Federal Constitution concerning commerce among the States, and that this necessarily excluded the action of the State upon the subject, Congress having occupied the field by its own legislation.

It was a point left undecided whether the power of Congress

<sup>1</sup>Kennedy's "Life of Wirt," Vol. II, p. 142.

to regulate commerce was exclusive only where exercised, or whether a State might exercise the power in the absence of Congressional action. In the subsequent case of *Wilson v. Blackbird Creek Marsh Co.*,<sup>1</sup> it was held that in a class of cases local in their character, regulations affecting inter-State commerce may be enacted by the States in the absence of the exercise of that power by Congress, and a State law was held valid which authorized a dam across a creek navigable from the sea within the ebb and flow of the tide on the ground that it did not conflict with any act of Congress. It is only recently that the controversy which has divided the Judges for many years upon the validity of laws passed by the States as police regulations and which do not amount to regulations of commerce has become in any manner fixed or settled.<sup>2</sup>

In *Brown v. The State of Maryland*,<sup>3</sup> the same interesting question arose as to the regulations of foreign commerce: whether a State could lawfully require the importer of foreign articles to take out a license from the State before being permitted to sell a bale or package so imported. Said the Chief Justice:

“There is no difference in effect between a power to prohibit the sale of an article, and a power to prohibit its introduction into the country. The one would be a necessary consequence of the other. No goods would be imported if none could be sold. No object of any description can be accomplished by laying a duty on importation, which may not be accomplished with equal certainty by laying a duty on the thing imported in the hands of the importer. . . . It is sufficient for the present to say generally that when the importer has so acted upon the thing imported

<sup>1</sup> 2 Peters, 245 (1829).

<sup>2</sup> The Passenger Cases, 7 Howard, 283 (1849); *Wabash Railway Co. v. Illinois*, 118 U. S., 557 (1886). *Philadelphia Steamship Co. v. Pennsylvania*, 122 U. S., 326 (1886). *Fargo v. Michigan*, 121 U. S. (1886) 230.

<sup>3</sup> 12 Wheaton, 419 (1827).

that it has become incorporated and mixed up with the mass of property in the country, it has perhaps lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer in his warehouse in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution.”<sup>1</sup>

In the case of *Craig v. The State of Missouri*<sup>2</sup> the Constitutional prohibition addressed to the States in relation to the emission of bills of credit was fully considered. An act of that State establishing loan offices and authorizing the issue of certificates of stock was declared void. The Chief Justice showed that the certificates of stock, which were signed by the auditor and treasurer of the State, to be issued by them to the amount of hundreds of thousands of dollars, of denominations not exceeding ten dollars nor less than fifty cents, purporting on their face to be receivable at the Treasury, or at any loan office of the State of Missouri, in discharge of taxes or debts due to the State, were undoubtedly intended to perform the same office as Bills of Credit.

“Had they been termed Bills of Credit,” said he, “instead of certificates, nothing would have been wanting to bring them within the prohibitory words of the Constitution. And can this make any real difference? Is the proposition to be maintained that the Constitution meant to prohibit names and not things? That a very important act, big with great and ruinous mischief, which is expressly prohibited by words most appropriate for its description may be performed by the substitution of a name? That the Constitution in one of its most important provisions may be openly evaded by giving a new name to an old thing? We cannot think so.”

<sup>1</sup> Compare the License Cases, 5 Howard, 504 (1847), and *Leisy v. Hardin*, 135 U. S., 100 (1890).

<sup>2</sup> 4 Peters, 410 (1830).



This case was decided by a divided Court, Justices Johnson, Thompson and McLean dissenting.

The precise question again arose, four years later, in the case of *Byrne v. State of Missouri*,<sup>1</sup> in which this decision was reviewed and confirmed.<sup>2</sup>

By this time it was quite apparent that the energy of the Court in upholding the provisions of the Constitution, in expounding its language, in applying its principles, and in vindicating its supremacy, had built up a national system of jurisprudence upon foundations so broad and deep that little else than revolution could shake it. "The importance of that Court," wrote William Wirt, as Attorney-General to President Monroe, "in the administration of the Federal Government, begins to be generally understood and acknowledged. The local irritations at some of their decisions in particular quarters (as in Virginia and Kentucky for instance) are greatly overbalanced by the general approbation with which those same decisions have been received throughout the Union. If there are a few exasperated portions of our people who would be for narrowing the sphere of action of that Court and subduing its energies to gratify popular clamor, there is a far greater number of our countrymen who would wish to see it in the free and independent exercise of its Constitutional powers as the best means of preserving the Constitution itself. . . . It is now seen on every hand, that the functions to be performed by the Supreme Court of the United

<sup>1</sup> 8 Peters, 40 (1834).

<sup>2</sup> These cases, as will be seen hereafter, conflict with that of *Briscoe v. The Bank of the Commonwealth of Kentucky*, 11 Peters, 257 (1837), one of the earliest Constitutional cases decided by Chief Justice Taney, in which it was held that an act incorporating the Bank of the Commonwealth of Kentucky was a Constitutional exercise of power by that State, and that the notes issued by the Bank were not bills of credit within the meaning of the Constitution.

States are among the most difficult and perilous which are to be performed under the Constitution. They demand the loftiest range of talents and learning and a sort of Roman purity and firmness. The questions which come before them frequently involve the fate of the Constitution, the happiness of the whole nation, and even its peace as it concerns other nations."<sup>1</sup>

Four years later the venerable Charles Carroll, of Carrollton, the last survivor of the Signers of the Declaration of Independence, and then upon the verge of the grave, wrote to Judge Peters: "I consider the Supreme Court of the United States as the strongest guardian of the powers of Congress and the rights of the people. As long as that Court is composed of learned, upright and intrepid judges, the Union will be preserved, and the administration of justice will be safe in this extended and extending empire."<sup>2</sup> Although some of the school of Jefferson might feel apprehensive of results, when viewing the strides of the nation towards power, yet there was no real cause for alarm, even on the part of those most opposed to consolidation, for in the case of the *Providence Bank v. Billings*,<sup>3</sup> the just powers of the States were carefully guarded. It was held that a law of Rhode Island imposing a tax upon a bank chartered by that State was valid, it being an exercise of sovereignty with which the Federal Constitution did not interfere.

The bank had been chartered in 1791, and in 1822 the Legislature had passed an act imposing a duty on licensed

<sup>1</sup> Wirt to Monroe, May 5, 1823. Kennedy's "Life of Wirt," Vol. II, p. 134.

<sup>2</sup> Letter of Charles Carroll, of Carrollton, to Hon. Richard Peters (U. S. District Judge at Philadelphia) 28th June, 1827, unpublished, in possession of the Historical Society of Pennsylvania. Peters' Papers.

<sup>3</sup> 4 Peters, 514 (1830).

persons and others, and bodies corporate within the State. The Bank resisted the payment of the tax on the ground that this act was repugnant to the Constitution of the United States, inasmuch as it impaired the obligation of the contract created by the charter. It was alleged that the cases of *Fletcher v. Peck*, and of *Trustees of Dartmouth College v. Woodward*, had established the principle that a legislative grant to a corporation was a contract within the meaning of the Constitution, and that the cases of *M'Culloch v. Maryland*, and *Weston v. City of Charleston*, had decided that the power of imposing a tax upon a corporation involved the power of destroying it. The act complained of was therefore contrary to the Constitutional prohibition.

The Chief Justice, however, in a very closely reasoned opinion, draws the distinction between the action of a State operating upon its own creatures, and the action of a State coming in conflict with a Constitutional law of Congress. Conceding that the charter of such a corporation was a contract, it was clear that the charter contained no stipulation exempting the bank from taxation. The power of taxation was one of vital importance. It was an incident of sovereignty essential to the existence of the State government and the relinquishment of such a power could never be presumed. It might be exercised, therefore, in all cases by a State unless it conflicted with an Act of Congress, the supremacy of which was always to be recognized. The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its own action, although it does not extend to those means which are employed by Congress to carry into execution powers conferred upon that body by the people of the United States. The act was, therefore, held to be Constitutional and valid.

Another instance of careful guardianship of the rights of the States is to be found in *Barron v. The Mayor of Baltimore*,<sup>1</sup> where it was held that the provision in the Fifth Amendment to the Constitution that private property shall not be taken for public use without just compensation, was a restriction upon the power of Congress alone, and not upon the States. It was shown by a simple but conclusive argument that each State was independent within its own sphere and free from the power of the United States.

In the case of *Ogden v. Saunders*<sup>2</sup> the Chief Justice for the first time found himself in a minority upon a question of Constitutional law, and was obliged to dissent from the opinion of the Court, and in this was supported by the views of Duvall and Story. The question raised involved another phase of that which had arisen in *Sturges v. Crowninshield*, the majority of the Court holding that the municipal law in force when a contract is made is part of the contract itself, and that if such a law provides for the discharge of the contract upon prescribed conditions, its enforcement upon those conditions does not impair the obligation of the contract of which that law itself was a part.

The dissenting judges maintained that, however an existing law may act upon contracts when they come to be enforced, it does not enter into them as part of the original agreement, and that an insolvent law which released the debtor upon conditions not in effect agreed to by the parties themselves, whether operating upon past or future contracts, impaired their obligation. But it was also held by a divided Court, Marshall concurring, that the State law, if a part of the contract, was such only as between citizens of that State,

<sup>1</sup> 7 Peters, 243 (1833).

<sup>2</sup> 12 Wheaton, 213 (1827).

and since the creditor in this case was a citizen of Louisiana, he was not bound by the New York insolvent law, and the debtor was not discharged.

These doctrines were again recognised in *Boyle v. Zacharie*,<sup>1</sup> in which the Chief Justice declared that inasmuch as they had been established by a majority of the Court they must be viewed as well-settled law.

A case now arose, closely connected with one of the most romantic and eventful chapters in the history of the nation. The controversy between the State of Georgia and the Cherokee tribe of Indians is memorable for its excitements, its influence upon the feelings of a large section of the Union, and for the extraordinary proceedings to which it gave rise. It marks a distinct stage of the process by which, one after another, the tribes of aborigines have melted away before a civilization which inevitably extinguishes whatever it cannot absorb. We can deal only with the legal aspect of the case.<sup>2</sup> A motion was made in the Supreme Court for an exercise of its original jurisdiction to restrain by injunction the execution of certain laws of the State of Georgia, in the territory of the Cherokee nation, the tribe claiming that they had the right to proceed as a foreign State, under the Constitutional provision which gave to the Court exclusive jurisdiction in controversies in which a State, or the citizens thereof, and a foreign State, citizens or subjects thereof, were parties. Although the anger of the American people was kindled in behalf of the unfortunate Indians, whose clear and undeniable rights had been wrested from them by the State without reference to the obligations owed to them by the Government of the United States, under the Treaty of Hopewell, yet it was

<sup>1</sup> 6 Peters, 348 (1832).

<sup>2</sup> *Cherokee Nation v. The State of Georgia*, 5 Peters, 1 (1831).

held that, though no case could be presented to the Court better calculated to excite their sympathies, yet the Court had no jurisdiction of the cause, inasmuch as the Cherokee nation was not a foreign State in the sense in which that term was used in the Constitution.

The Chief Justice showed, from the language of the Constitution, from the habits and usages of the Indians, from their relations to the whites, and their appeal to the tomahawk instead of courts of justice, that the statesmen who formed the Constitution could not have meant to designate them by the term *foreign State*. Besides this they were as clearly contradistinguished by a name, appropriate to themselves, from foreign nations, as from the several States composing the Union. In addition, the interposition of the Court would savor too much of the exercise of political power to be within the proper province of the judiciary. In these views Justices Johnson and Baldwin concurred, each in separate opinions, in which it was declared that neither politics nor philanthropy should ever impel the Court to assume such a judicial power, full of awful responsibilities. A powerful dissenting opinion, concurred in by Mr. Justice Story, was delivered by Mr. Justice Thompson. It is understood that the opinion of Chancellor Kent, in favor of the jurisdiction, had been obtained by counsel before the bill in equity was filed, and an effort was made, with what success is not known, to obtain from Chief Justice Marshall, in advance, his impressions in regard to the political character of the tribe.<sup>1</sup>

The subject at last became a matter of loyalty or disloyalty to the administration of President Jackson, which favored the removal of the Indians, and "a chord of insanity to

<sup>1</sup> See Letter of William Wirt to Judge Carr, June 21, 1830, Kennedy's "Life of Wirt," Vol. II, pp. 253, 257, 264.

many." The most intemperate abuse was showered upon the counsel for the Indians, William Wirt and John Sergeant, who reappeared, undaunted and ardent, in the case of *Worcester v. Georgia*,<sup>1</sup> in which it was held that a law of the State of Georgia, under which a missionary had been convicted of the crime of preaching to the Indians, and residing among them without a license from the governor, was unconstitutional and void.

"The treaties and laws of the United States," said the Chief Justice, "contemplate the Indian Territory as completely separated from that of the State, and provide that all intercourse with them shall be carried on exclusively by the Government of the Union." . . . "The Cherokee Nation is a distinct community, occupying its own territory with boundaries accurately described, in which the laws of Georgia can have no force, and in which the citizens of Georgia have no right to enter but with the assent of the Cherokees themselves, or in conformity with treaties or the acts of Congress. The whole intercourse between the United States and this nation is, by our Constitution and law, vested in the Government of the United States. The act of the State of Georgia under which the plaintiff in error was prosecuted is, consequently, void and the judgment a nullity."

The State of Georgia treated this decision with defiance. The missionary was still imprisoned in the penitentiary doomed to hard labor, the Governor declaring that he would rather hang him than liberate him under the mandate of the Supreme Court. The Federal Government gave no hope of interfering in the controversy. On the contrary Jackson is reported to have said: "John Marshall has made the decision, now let him execute it." At the end of eighteen months, however, cooler judgment and more moderate counsels prevailed; the contest had grown hopeless to the weaker party, and the prisoner was released.<sup>2</sup>

<sup>1</sup> 6 Peters, 515 (1832).

<sup>2</sup> See Kennedy's "Life of Wirt," Vol. II, p. 323.

Within a short time the Court had occasion, in the case of *The State of New Jersey v. The State of New York*,<sup>1</sup> to consider the method of procedure in the exercise of original jurisdiction in suits between States. Congress had passed no act for the special purpose of prescribing the mode in which suits should be conducted, and as has been seen,<sup>2</sup> Mr. Justice Iredell in his remarkable dissenting opinion in *Chisholm v. The State of Georgia* had contended that an Act of Congress was necessary to enable the Court to exercise its jurisdiction, but after a careful review of all the early cases in which States had been made defendants, and the rules respecting process, the Chief Justice announced that it had been settled, on great deliberation, that the jurisdiction might be exercised under the authority conferred by the Constitution. An order was therefore made, the complainant having observed the rule as to the service of process on the Governor and Attorney-General of the defendant State, that the cause might proceed *ex parte*, and be prepared for a final hearing.

In the case of *Watson et al. v. Mercer et ux.*,<sup>3</sup> it was held that the Supreme Court had no right to pronounce an act of a State Legislature void as contrary to the Constitution from the mere fact that it divested rights which had vested antecedently. Retrospective laws were not forbidden. The Constitutional prohibition was confined to *ex post facto* laws, and it had been determined that this phrase applied solely to penal and criminal laws.

With this case, the review of the decisions of the Court upon Constitutional questions during the time of Chief Justice Marshall is completed. The principles which governed the Court, during that time, in interpreting the Constitution, were

<sup>1</sup> 5 Peters, 284 (1831).

<sup>2</sup> See *Ante*, p. 175.

<sup>3</sup> 8 Peters, 88 (1834).



well expressed in the case of the *United States Bank v. Deveaux*,<sup>1</sup> where it is said:

“The Constitution and the law are to be expounded without leaning one way or the other, according to those general principles which usually govern in the construction of fundamental laws.”

And in *Ogden v. Saunders*,<sup>2</sup> where it is declared—

“That the intention of the instrument must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them nor contemplated by its framers.”

The rule is stated in another form in *Gibbons v. Ogden*<sup>3</sup> by the Chief Justice:

“The enlightened patriots who framed our Constitution and the people who adopted it must be understood to have employed words in their natural sense, and to have intended what they said. . . . We know of no rule of construing the extent of such powers other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred. . . . What do gentlemen mean by a strict construction? If they contend only against that enlarged construction which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the Constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument; for that narrow construction which would cripple the government, and render it unequal to the objects for which it is declared to be instituted, and to

<sup>1</sup> 5 Cranch, 62 (1809).

<sup>2</sup> 12 Wheaton, 213 (1827).

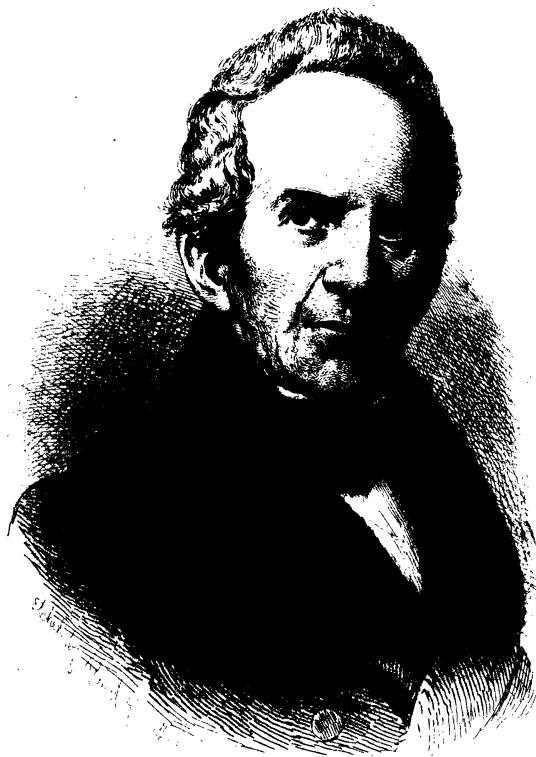
<sup>3</sup> 9 Wheaton, 1 (1824).

which the powers given, as fairly understood, render it competent, then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the Constitution is to be expounded."

Such were the principles of construction applied during a period of thirty-four years. There was no violent effort to stretch or strain the language of the Constitution, or make a cloak of the contents to cover usurpations of power. But all attempts to strangle the instrument itself, or impede the fair exercise of its delegations of authority, were promptly crushed. A steady, but scarcely noticeable application of a liberal and enlightened view, long continued, wrought marvels. "Stronger than he who makes the laws is he who can construe them for a long time." As was finely said in *Osborn v. The Bank of the United States*: "The judicial department has no will in any case. Judicial power is never exercised for the purpose of giving effect to the will of the judge, but always for the purpose of giving effect to the will of the law." And as it was the purpose of the people of the United States, in ordaining and establishing the Constitution for the government of themselves and their posterity, that the nation should be supreme, an impregnable wall of precedents was built up by slow degrees, which proved to be the bulwark and safety of the nation, when, in after years, the integrity of the Union was assailed by the armed legions of Secession.

During the period covered by the decisions which have been reviewed, death invaded the precincts of the Court and struck down several of the Associate Justices. The first victim of the insatiate archer was Mr. Justice Livingston, who had held his place for seventeen years since 1806. His successor was Smith Thompson, of New York, who was commissioned in the recess, September 1, and recommissioned, on confirma-





*J. H. Thompson*

tion by the Senate, December 8, 1823. At this time he was serving as Secretary of the Navy, under Monroe, and prior to that time had held for fourteen years, in the Supreme Court of New York, a place at the side of Chief Justice, afterwards Chancellor Kent, with Spencer and Tompkins, as Associates, and had distinguished himself at a time when that tribunal might claim in point of talent and learning to rank with any State Judiciary in the Union. He was born, according to some authorities, in Amenia, New York, in the year 1767, and, according to others, at Stanford, in Dutchess County, upon January 17, 1768. He received a common school education, and subsequently went to Princeton, graduating in his twentieth year, in 1788. He entered immediately upon the study of the law under Kent, supporting himself in the meantime by teaching school at Poughkeepsie, was admitted to the Bar in 1792, and began to practice at Troy. Pursuing his vocation with diligence, at the end of six years he became interested in politics and was sent to the State Legislature, serving also as a delegate to the State Constitutional Convention, and as attorney for the middle district of New York. In 1801 Governor Clinton appointed him an Associate Justice of the Supreme Court of the State, and in 1814 Kent having become Chancellor, Thompson became Chief Justice. He was called by President Monroe, four years later, to the position of Secretary of the Navy. Prior to this he had declined the Mayoralty of New York City. In 1823 he became the successor of the lamented Livingston in the highest court in the Union.

His acceptance of the latter place was not immediate, and there is evidence to show that he felt called upon to decline it. In the meantime the President was urged by his Attorney-General, William Wirt, to disregard political considerations

and confer the appointment upon James Kent. Thompson's subsequent determination prevented the association of one of the most illustrious names in American jurisprudence with the history of her highest tribunal. He held the place until his death in 1843.

His character as a Judge is best described by his associate, Mr. Justice Nelson, at the meeting of the Court held upon the occasion of his death. "From the time of his appointment to the Supreme Bench, he laboriously fulfilled all the obligations of his elevated station, which, it is no exaggeration to say, he illustrated and adorned, distinguished as he was for everything that can give a title to reverence. Of the assiduity, the patience, the energy and singleness of purpose with which he discharged his arduous official duties, his judicial associates made full acknowledgments; whilst of his genius, his attainments and his intellectual vigor, the recorded judgments of the Court during the whole term of his service furnish permanent attestation." Yale and Princeton in 1824, and Harvard in 1835, conferred upon him the degree of LL.D. He was interested in many benevolent enterprises, and at his death was the oldest Vice-President of the American Bible Society.

In February, 1826, Mr. Justice Todd succumbed to long continued illness, expressing a desire before his death that his place should be filled by Robert Trimble, then United States District Judge in the District of Kentucky. His preference and that of the President coincided, and Judge Trimble was commissioned an Associate Justice of the Supreme Court on the 9th of May, 1826. He was born in Augusta County, Virginia, in 1777, and was the son of William Trimble, one of the earliest settlers in Kentucky, a man of bold, firm and enterprising character, who encountered the dangers and hardships



*P. F. F. F.*





of a new settlement. Young Trimble, at the age of three years, accompanied his father at the time of his emigration, and the early years of his life were devoted to agriculture. He was called upon to take part in movements against Indian invasion, and distinguished himself by the display of courage and sagacity.

He had a powerful mind, developed by self-training, which prompted him to secure an education which would fit him for higher duties. By teaching an English school he procured the means of entering Bourbon Academy, and afterwards became a student in the Kentucky Academy, in Woodford County, where he completed his classical course. He then studied law, and in 1800 began its practice at Paris, in Bourbon County, where he married. In 1802 he was elected to the House of Representatives, but declined a re-election in the following year, preferring to devote himself to his profession. In 1807 he became a Judge of the Supreme Court of Kentucky, a position which he filled with increasing reputation. Three years afterwards he relinquished the office, to return to the Bar, and in 1810 refused a commission as Chief Justice of the State. He declined the same office in 1813, and continued to distinguish himself at the bar until 1817, when he received the appointment of District Judge of the United States for the District of Kentucky. He was a man learned in the law, just and discriminating in judicial investigation, and his decisions are characterized by great legal accuracy, research and perspicuity, and by a large and liberal equity. He was clear and comprehensive in his statements, and illustrated and enriched his discussions by abundant legal learning. His period of service in the Supreme Court was short, as in less than two years he was removed by death. Of him it has been said that perhaps no Associate Justice of the Supreme Court

of the United States occupying the position for so short a time, placed the result of his labor in so conspicuous a form. In *Montgomery v. Hernandez*<sup>1</sup> he defined a Federal question, declaring also that the party must claim the right under the Constitution for himself. In *Mallow v. Hinde*<sup>2</sup> he asserted the right of a United States Court to retain jurisdiction of a cause on an injunction bill as between the parties before it, until the plaintiffs could litigate their controversy with other parties in another tribunal, whereupon the United States Court would proceed with its adjudication. And in *United States v. Nichol*, he settled the rights of sureties upon official bonds as against the United States.<sup>3</sup>

The place vacated through Trimble's death was filled by the appointment of John McLean, of Ohio, who was commissioned upon the 7th of March, 1829. Although his genius was not brilliant, yet his talents were great, and his mind was able to comprehend the largest subject and did not shrink from the minutest analysis. He was eminently practical, ever zealous in the pursuit of truth, and his faculties were so well ordered that he could always utilize and control his ideas. He was born in Morris County, New Jersey, March 11, 1785, and at the early age of four years was taken by his father to Morgantown, Virginia, and afterwards to Nicholasville, Kentucky, from which the family removed, in 1799, to Ohio, where they settled in Warren County, clearing their farm by their own labor. His early education was slight, but at the age of sixteen years he studied under a private tutor. At this time his ambition to study law was aroused, and he en-

<sup>1</sup> 12 Wheaton, 129 (1827).

<sup>2</sup> 12 Wheaton, 193 (1827).

See an admirable biographical sketch prefixed to the First Volume of the Indexed Digest of the United States Supreme Court Reports, published by the Lawyers' Co-operative Publishing Co.



Etched by Albert Rosenthal, Phila. 1899

John Adams



gaged as a deputy in the Clerk's office in Cincinnati, maintaining himself in this manner while pursuing his legal studies under Arthur St. Clair. In 1807 he was admitted to the Bar, beginning practice at Lebanon, and in 1812 was sent to Congress, defeating two opposing candidates. In political principles he adhered to the Democratic Party, was an ardent supporter of the war, and of President Madison's administration. During his Congressional term he became the author of the law to indemnify individuals for property lost in the public service, and introduced resolutions of inquiry into the expediency of pensions for widows of officers and soldiers who fell in the service of their country. In 1814 he was re-elected by a unanimous vote, a rare distinction; and in the following year declined a nomination to the Senate of the United States. Shortly after this he was chosen by the Legislature to the position of Judge of the State Supreme Court, and to accept this position resigned his seat in Congress at the close of the session of 1816. His judicial career was marked by the ability and eloquence of his charges to grand juries, and the vigor and clearness of his opinions. In 1822 President Monroe appointed him a Commissioner of the General Land Office, and by efficiency and diligence he introduced order and economy into that department. In the following year he was appointed Postmaster-General, and continued to hold the same place under John Quincy Adams. When General Jackson became President he expressed a wish to retain him in this position, but as McLean differed with him on the question of official appointments and removals, and had little or no sympathy with the spoils system, he refused the portfolio. He was then offered successively the offices of the War and the Navy Departments, both of which he declined, but finally accepted the appointment of Justice of the Supreme Court of the United

States, as more in accord with his tastes and talents, and entered upon its duties during the January Term of 1830.

His term of judicial service continued until 1861. He is best known to the country as one of the dissenting judges in the Dred Scott case, but his opinions are well and favorably known to the profession for their clearness and vigor of expression. Although not in entire harmony upon the questions raised in the Passenger and License cases with the majority of his brethren, yet his views are expressed with uncommon and persuasive force. His sentiments upon the question of slavery were in effect that it had its origin merely in power, and was against right, and was sustained in this country by local law only. He became identified in sympathy with the party opposed to its extension, and his name came before the Free Soil Convention at Buffalo in 1848 as a candidate for the Presidency. In the Republican National Convention held in Philadelphia in 1856 he received, for the same nomination, 196 votes against 359 for John C. Fremont, and in 1860, at the Republican Convention in Chicago, he received several votes. Harvard University conferred upon him in 1839 the degree of Doctor of Laws. He published two volumes of Reports of his decisions at Circuit, and pronounced an eulogy upon James Monroe in 1831. He was a man of commanding appearance, of fine and noble presence, gentle, and courteous in manner, and affectionate in his intercourse with the members of the Bar. He died at the age of seventy-six, much beloved and respected. His devotion to duty was marked. Of him Chief Justice Taney said: "He held a seat on this bench for more than thirty years, and until the last two years of his life, when his health began to fail, was never absent from his duties here for a single day. The reports are the recorded evidence of a mind firm, frank and





Henry Baldwin



vigorous and full of the subject before him. He displayed in the office of Postmaster-General administrative talent hardly ever surpassed, with a firmness of character and uprightness of purpose never questioned."

Mr. Justice Washington died upon the 26th of November, 1829, and his vacant place was conferred upon Henry Baldwin of Pennsylvania, who was commissioned on the 6th of January, 1830. Baldwin, who was a man of extraordinary intellectual power, was a native of New Haven, Connecticut, where he was born on the 14th of January, 1780. He was a graduate of Yale College, studied law, and removed to Pittsburgh, and thence to Meadville, in Crawford County, Pennsylvania. His rise at the bar was rapid. He acquired early a position of eminent distinction, which he never lost, due to strong reasoning powers, retentive memory, and profound and varied knowledge. His arguments were characterized by singular fullness of illustration of authority; his language was fluent, ardent and eloquent. After several years of successful practice, and a career of activity in politics, he was sent to Congress in 1817, remaining a member of that body until 1822. In 1819 he acted as the Chairman of the Standing Committee on Manufactures, and distinguished himself as an advocate of the encouragement of American industries; he was one of the small minority of the delegation from Pennsylvania who sustained, on its final passage, the bill for the admission of Missouri into the Union. So high were his professional attainments, and so great was the legal ability displayed in his Congressional career, and such the reputation he had acquired for superior talents and extensive information and learning, that he was selected by President Jackson as an Associate Justice of the Supreme Court. Upon the bench he soon attracted to himself the attention of the Bar and the

country by challenging the Constitutional views of Chief Justice Marshall and Mr. Justice Story. He construed the Constitution as the grant of the people of the several States, and not as the grant of the people of the United States in the aggregate, and constantly dissented from the judgments of his associates, particularly upon questions involving the Constitutionality of State laws alleged to impair the obligation of contracts. He was one of the dissenting Judges in *Craig v. Missouri*, maintaining an opposite view to that of the Chief Justice upon the nature of Bills of Credit, and in other cases always inclined to a construction which would sustain a State law as a police regulation, rather than overturn it as an attempt to regulate commerce. Each State, according to his theory, was a single sovereign power in adopting the Constitution, and he held that the operation of the Constitution must, of necessity, be like that of a treaty of cession by a foreign State to the United States. It has been asserted that he largely over-estimated the impression which his repeated dissents had produced upon other members of the Supreme Court, and this overweening self-reliance led him to prepare "A General View of the Origin and Nature of the Constitution and Government of the United States," embracing in large part his dissenting opinions, and published after Mr. Taney had become Chief Justice. He frankly admitted that his views might be deemed "peculiar," and "founded on a course of investigation different from that which is usually taken." No more graphic statement of the complete want of cohesion among the judges at this period upon the question of Constitutional law can be found than that given by Baldwin: "In the case of the Commonwealth Bank of Kentucky I was in the minority; in the Charles River Bridge case it now appears that I stood alone after the argument in 1831;

the Tennessee boundary case hung in doubtful scales, and in the New York case I was one of the bare majority. By changes of judges and of opinions there is now but one dissentient in three of the cases; and though my opinion still differs from that of three of my brothers who sat for the fourth, six years ago, it is supported by the three who have been since appointed. Placed in a position as peculiar now as it was then, and since, I feel called upon to defend it, and to explain the reasons why it was then assumed and is now retained."

His labors upon the circuit were marked by the same extraordinary grasp and vigor of mind. In 1833 he delivered an opinion in the case of *McGill v. Brown*,<sup>1</sup> in construction of the will of Sarah Zane, upon the subject of a bequest for pious and charitable uses, which, in the judgment of the late United States District Judge, John Cadwalader, himself a jurist of extraordinary learning, was the greatest legal opinion ever delivered. He discussed the question with a degree of industry, learning and research that can scarcely be paralleled in the annals of jurisprudence. Towards the close of his life his intellect became deranged, and he was violent and ungovernable in his conduct upon the bench. His death occurred in Philadelphia upon the 21st of April, 1844, at the age of sixty-five years. He died from paralysis, and in such abject poverty that a subscription among his friends was required for his burial.

In August, 1834, Mr. Justice William Johnson, of South Carolina, died, after a judicial service of more than thirty years. His place was filled by the appointment of James M. Wayne, of Georgia, who was commissioned on the 9th of

<sup>1</sup>Published with note to *Blenon's Est.*, *Brightly's Rep.* (Pa.) 346.

January, 1835. He was a native of Savannah, where he was born in 1790. He received an excellent preliminary education from a private tutor, and entered Princeton College so early that he became a graduate in 1808. Returning home, he read law, and was called to the Bar within two years, practicing in his native city. In 1813 he was elected a member of the General Assembly as an opponent of the Relief Law, which had created much feeling in the State. He was twice re-elected, and subsequently declined to become a candidate. In 1823 he was chosen Mayor of his native city, and in the following year was placed upon the bench of the Superior Court, holding this office for five years, and acquiring an honorable distinction as a judge. From 1829 until 1835 he was a member of Congress, where he took an active share in debate, and supported General Jackson in his Anti-Nullification acts. The President expressed his appreciation of Wayne's services by appointing him an Associate Justice of the Supreme Court. In Congress he favored free trade, opposed internal improvements by Congress, except of rivers and harbors, was conspicuous in his opposition to the re-chartering of the United States Bank, claiming that it would confer dangerous political powers upon a few individuals. He took an active part in the removal of the Cherokee Indians to the West. He presided in two conventions held for the revision of the Constitution of Georgia, and was for many years President of the Georgia Historical Society, and one of the Trustees of the University of Georgia, taking an active part in promoting and extending education in his native State. He was the last member of the Supreme Court as constituted under Chief Justice Marshall, a fact which was one of the felicities of his career, and while it was the remarkable fortune of President Jackson



*James M. Wayne*



to fill a majority of the seats upon the bench of the Supreme Court by appointments to vacancies occurring during his term, it was the lot of Mr. Justice Wayne to be the last survivor of these appointees. As a judge he was learned, able and conscientious, and during an era of strict construction he inclined to the support of national views. His opinions are especially valued upon questions of admiralty. At the outbreak of the Civil War his sympathy and efforts were all with the cause of the Union, and his opinions indicate his fidelity to the Constitution, as interpreted by the principles of Marshall. He lived to see the triumph of his views and the restoration of Peace under conditions which promised to be permanent.

We have now reached the close of a distinct epoch in the history of the Court. The career of Chief Justice Marshall was over. He had seen Washington, his associate for thirty years, stricken down by death, and Johnson, his fellow-laborer for the same period of time, disabled by age and infirmity. He had seen Duvall, at the age of eighty-two, retire from the consultation-room, and had followed Livingston and Todd to their graves. Of all the Judges who had shared with him the grandeur and glory of his unexampled career Story alone remained. New doctrines and new men were pushing for place and recognition. The Executive was distinctly hostile, and was resolved upon revolutionizing the Court. Five vacancies had occurred during the past ten years, and men had been appointed, who gradually broke away from the old doctrines. Thompson, McLean, Baldwin and Wayne, although full of personal reverence for the exalted character of the aged Chief Justice, had but little sympathy with that school of Federalists whose principles had become the adamant foundations of our jurisprudence. They belonged to a later generation and

were the representatives of new forces. Substantial unanimity of opinion upon a Constitutional question became a thing of the past. A cloud no larger than a man's hand had arisen, and its shadow was felt in the cases of *Briscoe v. The Bank of the State of Kentucky*, and *The City of New York v. Miln*.<sup>1</sup> It was a solemn and ominous announcement that in cases involving Constitutional questions unless four judges should concur, no judgment would be delivered, except in cases of necessity, and as four judges had not concurred in those cases, that they should stand over for re-argument.

But however anxious Marshall might be as to the future, the past was secure, and he could reflect with serene satisfaction upon what had been accomplished. The clouds that gathered about his dying head burned with the unquenchable glories of his matchless day. He and his associates had considered jointly many of the most important powers of Congress; they had established and sustained the supremacy of the United States; their right as a creditor to priority of payment; their right to institute and protect an incorporated bank; to lay a general and indefinite embargo; to levy taxes; to preempt Indian lands; to control the State militia; to promote internal improvements; to regulate commerce with foreign nations and among the States; to establish a uniform rule of naturalization and uniform laws on the subject of bankruptcy; they had dealt with a mass of implied powers incidental to the express powers of Congress; they had enforced the Constitutional restrictions upon the powers of the States; they had stricken down pretentious efforts to emit bills of credit, to pass *ex post facto* laws, to control or impede the exercise of Federal powers; to impair the obligations of contracts; to tax

<sup>1</sup> 8 Peters, 118 (1834).



national agencies; to exercise power over ceded territory; to cripple commerce, and to defy the lawful decrees of the Federal Courts. They had faced the frowns of Jefferson and Jackson, and conquered both by invincible logic. They had subjected the ministerial officers of the Executive Department to the control of the judiciary, and had shivered into atoms the pretensions of Congress to override the Constitution. They had defined the jurisdiction of the Federal Courts, both original and appellate, and had sustained against the most stubborn resistance of sovereign States the right of the supreme tribunal to supervise decrees of State courts, when denying a right conferred by the Constitution. They had dealt with all those lofty questions of international law which grew out of the War of 1812; they had developed the admiralty and maritime jurisdiction of the District Courts, as well in matters of prize as on the Instance side of the Court, and had extended the application of the principles of commercial law. They had swept through the domain of chancery, and placed the law of trusts and charities upon a stable basis. They had reared a solid and magnificent structure, destined "at no distant period of time to cast a shadow over the less elevated and the less attractive and ambitious systems of justice in the several States." In doing this, they entitled themselves forever to the gratitude and veneration of posterity. These results had been accomplished solely through the moral force which belonged to the independent position of the Judiciary. With no direct control over the sword or purse of the nation, with no armed force behind them, surrounded by no halo of military achievements to dazzle the people, supported by no party obedient to their behests, with no patronage to distribute, and with no appropriations to attract a crowd of camp followers, the Judges of the Supreme Court, placed by the Constitution beyond the

reach of partisan influences, and protected by the life tenure of their offices from sudden gusts of passion, wrought on in the quiet performance of their duty, without fear or favor, and relied for the results upon the reverence of the people for the majestic and final utterances of the Law, with a proud consciousness of their authority.

The judgments of Marshall carried the Constitution through the experimental period, and settled the question of its supremacy. "Time has demonstrated their wisdom. They have remained unchanged, unquestioned, unchallenged. All the subsequent labors of that high tribunal on the subject of Constitutional law have been founded on, and have at least professed and attempted to follow them. There they remain. They will always remain. They will stand as long as the Constitution stands. And if that should perish, they would still remain to display to the world the principles upon which it rose, and by the disregard of which it fell."<sup>1</sup>

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#### NOTE.

The amount of work done by the Supreme Court during the time of Marshall has been estimated as follows: 1106 opinions were filed, of which 519 were delivered by Marshall, the remainder being unequally divided among the fifteen judges who were his Associates. Eight dissenting opinions were filed by Marshall, only one of which involved a question of Constitutional law; *Ogden v. Saunders*. From 1801 to 1835 sixty-two decisions were given upon Constitutional questions, in thirty-six of which the opinion was by Marshall, the remaining twenty-six being by one of seven Justices. These decisions are reported in 30 volumes of Reports from 1 Cranch to 9 Peters inclusive. (See note and table to a lecture on Constitutional Development in the United States as Influenced by Chief Justice Marshall, by Henry Hitchcock, LL.D. "Constitutional History as Seen in American

<sup>1</sup> Address of Hon. E. J. Phelps, at the Second Annual Meeting of the American Bar Association, Aug. 21, 1879.

Law," pp. 118-120. "The Supreme Court of the United States," by W. W. Willoughby, p. 90.)

An effort has been made to depreciate this work. Mr. Shirley, in his book on the Dartmouth College Causes, p. 386, says: "The extent of the business of the Supreme Court during the time of Marshall has been much exaggerated. Less than 1300 cases were decided by it, and in those, Marshall delivered about five hundred opinions, or on an average about fifteen a year. During the first two years after he came to the bench, but five causes were decided, in four of which he delivered the opinion. His first term lasted five days. The average number of causes decided per year was less than forty. But a few years ago the Supreme Court of Pennsylvania, under Chief Justice Agnew, held a term of seven weeks, and in that time disposed of 425 out of 450 cases on his docket. The contrast is apparent."

This is captious criticism; the substitution of quantity for quality. Let the curious reader compare the exhaustive and profoundly reasoned opinions of the one period, with the *Per Curiam* decrees of the other, and decide whether he prefers breathless haste to careful argument and judicial deliberation.

## CHAPTER XV.

FOURTH EPOCH: 1835-1850. THE FIRST HALF OF TANEY'S JUDICIAL CAREER: GENERAL CHARACTER OF QUESTIONS DISCUSSED: SKETCH OF CHIEF JUSTICE TANEY: SKETCHES OF JUSTICES BARBOUR, SMITH, CATRON, MCKINLEY, AND DANIEL: LEADING CASES: CHANGE IN THE PRINCIPLES OF CONSTITUTIONAL INTERPRETATION: STATE OF NEW YORK *v.* MILN: BRISCOE *v.* BANK OF THE COMMONWEALTH OF KENTUCKY: CHARLES RIVER BRIDGE CASE: LIMITATIONS UPON THE DOCTRINE OF THE DARTMOUTH COLLEGE CASE: LAMENT OF JUSTICE STORY: MISCELLANEOUS CASES: KENDALL *v.* UNITED STATES: RHODE ISLAND *v.* MASSACHUSETTS: CORPORATION CASES: LIMITATIONS UPON THE POWERS OF THE STATES: FLORIDA LAND CLAIMS: MARTIN *v.* WADDELL: SWIFT *v.* TYSON: THE ESTABLISHMENT OF THE DOCTRINE OF A GENERAL COMMERCIAL JURISPRUDENCE: THE FUGITIVE SLAVE LAW: PRIGG *v.* COMMONWEALTH OF PENNSYLVANIA: CASES RELATING TO SLAVERY: MISCELLANEOUS CASES: THE GIRARD WILL CASE: THE MYRA CLARK GAINES CASE: CASES OF INTER-STATE COMMERCE: THE LICENSE CASES: THE PASSENGER CASES: ADMIRALTY CASES: WARING *v.* CLARK: CASES AFFECTING THE RELATIONS OF THE STATE TO THE UNION: LUTHER *v.* BORDEN: GENERAL REVIEW OF WORK ACCOMPLISHED BY THE COURT AT THIS TIME: SKETCH OF THE BAR OF THE SUPREME COURT.

WE now enter upon the fourth great epoch in the history of the Court; an era of individual views, of doubts and queries, of numerous dissenting opinions, of strict construction of the Constitution, of State ascendancy, of final submission to what Von Holst has called the "Slaveocracy," an epoch bearing bitter fruit, and serving, at the end of a quarter of a century, to bring into striking prominence the value of Marshall's work, and the necessity of appealing to his principles of interpretation if the integrity of the Union was to be preserved.

A change in the constitutional doctrines of the Court was to be expected. It was the natural and legitimate outgrowth of the times. The country was upon the verge of

that wonderful physical advance which was checked, but not stifled, by civil war. Steam was about to be applied to locomotion on land as well as water. The sumpter mule, the pack horse, and the Conestoga wagon were to be supplanted by railroads; coal was mined; canals were dug; new highways were constructed and old ones improved; bridges were thrown across streams and rival corporations contended about tolls; post routes were extended; newspapers were distributed. The energies of the States in the direction of internal improvements were fully aroused; banking institutions multiplied. The growth of cotton manufacture stimulated slavery in the South and the factory system in the North. New and vast regions were rescued from the wilderness; immense accessions of national territory were made: the tide of foreign immigration was more than doubled; commercial or police regulations were attempted. Jealousy of national institutions became rife. The slave power contended for the mastery.

Amid the conflict of these forces old questions assumed new aspects, or new questions crowded out the old. The legality and utility of the Bank of the United States, which had been sustained in *M'Culloch v. Maryland*, were now denied. President Jackson vetoed the Bill to recharter the Bank, and denied the binding effect of that immortal judgment. "If the opinion of the Supreme Court," said he, "covered the whole ground of this act, it ought not to contest the co-ordinate authorities of this government. The Congress, the Executive and the Court must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution swears that he will support it as he understands it, and not as it is understood by others."<sup>1</sup>

<sup>1</sup> The question whether the Departments of the Government are independent of each other, and can construe the Constitution for themselves is one which has led

In this view he was supported by the advice of his Attorney-General, who, in a few months, was to become Chief Justice of the United States as the immediate successor of John Marshall. The right of the States to make regulations as to passengers from foreign ports; to incorporate banks to do business in behalf of the State; to grant franchises, such as bridges, ferries and the like, notwithstanding previous grants, unless the first charter was exclusive in its terms; and the right of the State corporations by comity to make contracts and carry on business in other States—these and other questions arose, and were determined in such a manner that Judge Story wrote that he was convinced that the doctrines and opinions of the old court were losing ground, and that new men and new opinions had succeeded.

Much of what was done, however, has proved of imperishable value. It was well that certain doctrines, particularly those relating to legislative grants, should not be permitted to run to dangerous extremes. It was well that the "Commerce clause" should be critically discussed, lest the powers of the States to protect themselves against disease, pauperism, disorder and crime should be too closely shorn. In this field, Chief Justice Taney wrought better than he knew, and

to much interesting discussion. Attorney-General Bates, in a memorable opinion written in 1861 (*Opinions Attys.-General*, Vol. X, p. 74) reached the conclusion that the President was independent, and therefore, could lawfully suspend the privilege of the writ of *habeas corpus* and refuse to obey the writ when issued by the Courts. Mr. Robert G. Street, of Texas, in a paper read before the American Bar Association in August, 1883 (6 *Report Amer. Bar Assn.* 17), reaches the same conclusion, and his views are reviewed in a paper of great ability by Mr. Wm. M. Meigs, of Philadelphia (19 "*Amer. Law Review*," 190 *et seq.*), which exhausts the learning of the question. The results reached by these writers have not been accepted without adverse comment, and an interesting discussion, in which several important distinctions are drawn, is to be found in a paper by Mr. Sydney G. Fisher, of Philadelphia (21 "*Amer. Law Review*," 210 *et seq.*).





*W. B. Tenny*  
1899

*W. B. Tenny*



was singularly possessed of "that insight, that unconscious sympathy with human progress, which induces a judge, while scrupulously administering existing law, to expand and advance and develop it, commensurate with human needs."<sup>1</sup>

Roger B. Taney was commissioned as Chief Justice upon the 15th of March, 1836. At this time he was nearly sixty years of age, and, with the exception of a few brief periods of public service, had devoted his great abilities with unre-laxed attention to active practice. In knowledge of technical details in all departments of legal learning, in the mastery of principles derived from constant and varied occupation in the argument of causes in Courts of inferior and superior jurisdiction, both State and national, he excelled every one of his predecessors. He ascended the bench at a much later period in life than they, and had long before his promotion attained the rank of a veteran leader of the bar. Unlike many of his associates, he had not the advantage of a previous judicial experience, but gave ample compensation in his long familiarity with the tribunal over which he was called to preside, having argued many important causes in opposition to Wirt, Webster, Berrien and Jones. Delicate in health, but vehement in his feelings and passionate in temper, he expressed himself at times with extraordinary vigor, and acted with promptitude and decision. He was a man of the highest integrity and of great simplicity and purity of character. By watchfulness of himself he had acquired perfect self-control; his courage was unflinching; his industry was great; and his power of analysis was unusual, even among men remarkable for such a gift. His judicial style was admirable, lucid and logical, and, like his arguments, displayed

<sup>1</sup> Address of Hon. Clarkson N. Potter at 4th Annual Meeting of American Bar Association, August 18, 1881.

a thorough knowledge of the intricacies of pleading and niceties of practice, as well as a thorough comprehension of underlying principles. Wirt dreaded his "apostolic simplicity," and on one occasion spoke of him as a man of "moon-light mind,—the moon-light of the Arctics, with all the light of day without its glare." He adhered closely to the language of the Constitution, never extending the words of the grant upon the ground of convenience or necessity. He was always anxious to protect the States in the full and unfettered exercise of their reserved powers. The Union, in his apprehension, was one of States which had ceded great prerogatives of sovereignty for purposes either expressly stated in the Constitution or "necessary and proper" to the exercise of those expressly granted. All that were not surrendered were retained in their original fulness and force. He read the Constitution, as, strange to say, Oliver Wolcott once feared that Marshall would do, "as if it were a penal statute," and was sometimes "embarrassed with doubts, of which his friends will not perceive the importance." Yet, on occasion, his judgments bore the stamp of the broadest statesmanship. The limitations upon the doctrine of the Dartmouth College case, as expressed in the Charles River Bridge case,<sup>1</sup> have produced the happiest results in freeing the States from the grasp of monopolists, and in leaving them uncrippled in the exercise of most important rights of sovereignty. While in the cases of *Waring v. Clark*<sup>2</sup> and *The Genesee Chief*,<sup>3</sup> in which the admiralty and maritime jurisdiction of the Federal Courts is extended above tide-water on the Mississippi and to the entire chain of the Great Lakes and the waters connected with them, his opinions are characterized by great judicial breadth

<sup>1</sup> 11 Peters, 420 (1837).

<sup>2</sup> 5 Howard, 441 (1847).

<sup>3</sup> 12 Howard, 443 (1851).

of view. And in *Ableman v. Booth*<sup>1</sup> he was most emphatic in the maintenance of the supremacy of Federal law. Upon this fair record but one blot appears. The "damned spot" of the Dred Scott decision will not "out," and though other illustrious names must share in the infamy of that fatal blunder, yet the Chief Justice, by virtue of his eminence, must carry the blood-stain on his ermine to eternity.

Roger Brooke Taney was born in Calvert County, Maryland, on the 17th of March, 1777. His ancestors, upon both sides, were among the earliest settlers of the State, who in the time of Cromwell sought repose and liberty of conscience under the protection of Lord Baltimore's enlightened government. Their Catholic faith was inherited and faithfully kept by their renowned descendant. He was educated at Dickinson College, Carlisle, in the State of Pennsylvania, of which institution he became a student in 1792. In three years he was graduated, and began the study of the law at Annapolis, in the office of Jeremiah T. Chase, who had been appointed, but a short time before, Chief Justice of the General Court of Maryland. Upon his admission to the bar he returned to his native county, but was soon called into political life as a delegate to the General Assembly. Although scarcely twenty-three years of age, he won distinction, but declining a reelection, removed to Fredericktown, where for twenty-two years he devoted himself, with increasing success and growing reputation, to the practice of the law. He soon became employed in many important causes, and, as the Reports show, was constantly in conflict with Pinkney, Winder, Martin, Harper and Johnson. He entered every tribunal, civil and criminal, the county courts, the courts of equity, the Court of Appeals, and even Courts Martial. He was of counsel for General Wilkin-

<sup>1</sup> 21 Howard, 506 (1858).

son, Commander-in-chief of the United States Army, summoned before a military court upon grave and high accusations, and conducted the case to a successful issue. He incurred censure in defending a Methodist preacher for inciting slaves to insurrection, but encountered successfully both popular excitement and judicial power. In 1816 he was chosen a member of the Maryland Senate, and served for a period of five years. In 1823 he removed to Baltimore, and disputed with Wirt the sceptre of professional eminence which had fallen from the dead hand of Pinkney. He now entered upon the enlarged sphere of practice before the Supreme Court of the United States. Here he argued *Manro v. Almeida*,<sup>1</sup> an admiralty case; *Etting v. The Bank of the United States*,<sup>2</sup> involving a principle of legal ethics; *Cassel v. Charles Carroll of Carrollton*,<sup>3</sup> a claim under the original proprietary title of Maryland; *Brown v. Maryland*,<sup>4</sup> involving the question of the extent of the power to regulate foreign commerce, and *United States v. Gooding*,<sup>5</sup> an indictment for a violation of the Act forbidding the Slave Trade. In 1827 Mr. Taney, though politically opposed to the Governor and Council of Maryland, was appointed Attorney-General of the State. This office he resigned upon receiving, in June, 1831, an invitation to enter the Cabinet of President Jackson as Attorney-General of the United States. At this time he argued *McLanahan v. The Universal Insurance Company*,<sup>6</sup> a question of marine insurance; *Van Ness v. The Mayor of the City of Washington*,<sup>7</sup> and the cases of *Tiernan et al. v. Jackson*, *The Patapsco Insurance Co. v. Southgate*, and *Shepherd v. Taylor*.<sup>8</sup> His manner and

<sup>1</sup>10 Wheaton, 473 (1825).

<sup>2</sup>11 *Ibid.*, 59 (1826).

<sup>3</sup>*Ibid.*, 134 (1826).

<sup>4</sup>12 *Ibid.*, 419 (1827).

<sup>5</sup>Wheaton, 460 (1827).

<sup>6</sup>1 Peters, 170 (1828).

<sup>7</sup>4 *Ibid.*, 232 (1830).

<sup>8</sup>5 *Ibid.*, 580, 604, 675 (1831).

style are described as impressive, logical, clear, calm, argumentative, simple and unostentatious, addressed to the reason and not to the passions. Seven other cases were argued by him before he ascended the bench, among which was the leading case of *Barron v. The City of Baltimore*.<sup>1</sup>

As Attorney-General, Mr. Taney bore a prominent part in the Nullification controversy, the question of the re-chartering of the United States Bank and the removal of the deposits. From the beginning he was a decided and earnest opponent of the Bank, and co-operated heartily with the President in his system of prompt and vigorous action against that institution, so much so indeed, as to call forth the protests and the censure of a powerful majority in the Senate of the United States, headed by Webster and Clay. When Mr. Duane, then Secretary of the Treasury, after refusing to remove the deposits at the dictation of the President, refused to resign his office, he was summarily removed, and Mr. Taney was invited to take his place. Although reluctant to exchange his professional position for one purely political, he felt called upon to accept what he deemed to be the post of duty, and shortly after his entry signed the famous order for the removal of the deposits from the Bank; or, more correctly speaking, directed the collectors of revenue to cease making deposits in the Bank, leaving the amount actually on deposit to be drawn out at intervals, and in different sums, according to the course of the government disbursements. In the following December, as Secretary of the Treasury, he communicated his reasons for the removal of the deposits, but at the instance of Mr. Clay a resolution of censure upon the action of the President was adopted, as well as a declaration that the reasons assigned by the Secretary were "unsatisfactory

<sup>1</sup>7 Peters, 243 (1833).

and insufficient." At the same time his nomination was rejected, and he thereupon placed his resignation in the hands of the President, and returned to Baltimore. In the following January Mr. Justice Duvall resigned his office in consequence of extreme deafness, due to the infirmities of age, and the name of Mr. Taney was sent to the Senate to supply the vacancy. It is known that Chief Justice Marshall favored his appointment, but the Senatorial opposition was so strong that it failed of confirmation; a vote of indefinite postponement being considered as equivalent to a rejection. Thus matters stood, when in the following summer Chief Justice Marshall died. The complexion of the Senate having changed in the meantime, upon the 28th of December, 1835, President Jackson sent in the name of Mr. Taney for the office of Chief Justice of the Supreme Court, and the name of Philip P. Barbour, of Virginia, for the office of Associate Justice. Mr. Clay again labored to defeat the nomination, and made a bitter assault upon Mr. Taney, but many years afterwards frankly apologized for it, and stated that he sincerely regretted the occurrence. He went even further, and called him a fit successor of Marshall. The commissions of Taney and Barbour were dated March 15, 1836.

Philip P. Barbour was of Scottish descent, his great-grandfather having immigrated to this country, and been one of the first settlers in the territory lying between the base of the Blue Ridge and the Southwest mountains, in the State of Virginia. His father, Thomas Barbour, was a man of inherited wealth and a member of the old House of Burgesses, representing the County of Orange. He was one of the Signers, in 1769, of the "Non-Importation Agreement," and was subsequently elected to the Legislature. His character was highly spoken of by Richard Henry Lee, who, in a letter to his brother, de-



*G. P. B. 1840*





clared that he was glad that Thomas Barbour was in our State councils, for he was a truly intelligent and patriotic man. On his mother's side Mr. Barbour was related to the distinguished Judge Edmund Pendleton, who had been thought of at one time by Washington as an appointee for the Supreme Court. Philip Pendleton Barbour was born on the 25th of May, 1783, but owing to disasters which overtook his father, did not receive the liberal education which his talents and early promise would have justified. He was, however, sent to school, where he exhibited great aptitude for the acquisition of languages, and became remarkable for his mastery of Greek and Roman literature. During the early part of 1800 he studied law, but in October determined to visit Kentucky, where he began the practice of his profession. A short time after, yielding to the persuasions of friends, he returned to Virginia, and having borrowed the necessary funds, spent one session at William and Mary College. He subsequently renewed the practice of the law and applied himself unceasingly to his profession. In 1812 he was elected to the Assembly, where he continued two sessions. In 1814 he was sent to Congress and served until 1825. For many years he acted as Chairman of the Naval and Judiciary Committees, and in 1821 was chosen Speaker. So conspicuous had he become for legal knowledge, that in 1825 he was offered the professorship of Law in the University of Virginia, and was pressed by Mr. Jefferson to accept it. He refused this station, however, and was appointed a Judge of the General Court of Virginia. Two years afterwards he resigned his seat upon the bench, and was re-elected without opposition to Congress. In 1829 he served with Madison in the Convention called to amend the Constitution of his State and presided over the deliberations of the Convention in a manner which is spoken of in the highest terms.

In 1830 he accepted the position of District Judge for the Eastern District of Virginia, declining the Chancellorship and also the post of Attorney-General. He also refused nominations for a seat in the Court of Appeals, the Gubernatorial chair and the Senate of the United States. As a Federal Judge he won new distinction, and was called, in 1836, to serve in the Supreme Court of the United States. While at the Bar, he had argued before that tribunal, the celebrated case of *Cohens v. The State of Virginia*, involving the question of the appellate power of the Supreme Court over State tribunals. His argument, although unsuccessful, is deserving of the closest attention, inasmuch as it is characterized by great subtlety and a display of analytical power. He contended that the true construction of the Constitution limited the appellate power of the Supreme Court of the United States to a revision of the judgments of Federal Courts alone, and that although a Federal question was directly involved in the case under argument, yet inasmuch as the suit had been brought in a State court, and the defendant had not exercised his right of removal into the Federal Courts, that no question appeared upon the record of which the Supreme Court could take cognizance.

His career as an Associate Justice was brief, but his judgments sustained his reputation, and have elicited great respect. He died suddenly of heart disease on the 24th of February, 1841.

Under the Act of March 3d, 1837,<sup>1</sup> the number of Justices of the Supreme Court was increased to nine. Two nominations were made. William Smith, of Alabama, was commissioned upon the 8th of March, 1837, but declined the position, owing, doubtless, to his advanced years. Mr. Smith was a

<sup>1</sup> 5 United States Statutes at Large, Vol. II, p. 176, Chap. 34.





*J. Catron.*

North Carolinian by birth, and had served as a member of Congress, and as United States Senator from South Carolina for an unexpired term, but was defeated for re-election by Robert Y. Hayne because of his opposition to the views of Mr. Calhoun.

The second nomination was that of John Catron, of Tennessee, who was commissioned upon the same day as Mr. Smith and duly accepted. He was born in Wythe County, Virginia, according to some authorities, and, according to others, in Pennsylvania, in the year 1786. He received a common school education, and in 1812 began the study of law in Kentucky, where he removed at an early age. He had taken an active part in the campaign of New Orleans under General Jackson, and in 1815 was admitted to the bar, after four years of study, in which he devoted to his work sixteen hours a day. Shortly after his admission he became State Attorney for his Circuit, and upon settling in Nashville, in the year 1818, attained high rank as a Chancery lawyer. He was chosen Judge of the Supreme Court of Tennessee in September, 1824, and served as Chief Justice in the same Court from 1830 to 1836, when he was retired under the provisions of the new Constitution of the State. He owed his appointment to his highest judicial station to the friendship of President Van Buren, who had been attracted by his great knowledge of the laws applicable to land titles, a branch of unusual importance in the portion of the Union which he represented. His power of juridical analysis was remarkable, and he sought in all cases to weigh and examine every authority cited by counsel, and accepted such only as seemed to be founded upon principle. Although himself a noted duellist, he exerted himself to the utmost to suppress the practice of duelling. He also became known for his efforts in enforcing the statutes of limitations in real estate actions. Although a

Democrat in politics, in 1860 and 1861 he vehemently opposed Secession, exerting his influence with members of Congress and others to prevent war. Owing to his Union sentiments he was driven from his native State, but, in 1862, returned to his Circuit, then the eighth, feeling that it was important that the judicial authority of the Union should be maintained. He had arranged for a special term of the Circuit Court to be held in the city of St. Louis, when he found himself penned within the rebel lines in Tennessee, and informed the District judge in Missouri that if he could effect his escape he would be present. This he accomplished, and boldly declared from the bench his approbation of all measures that had been adopted to vindicate the authority of the United States. Upon returning to Nashville, he was warned to leave the city, and, responding to his wife's entreaties and the promptings of loyalty, yielded to what he deemed to be a duty. He died in 1864, at the age of four-score years, after a life of usefulness and distinction. It was the testimony of his brethren of the Bench that, in the learning of the Common Law and of Equity Jurisprudence, and especially in its application to questions of real property, he had few equals and hardly a superior. He was distinguished by strong, practical, good sense, firmness of will and honesty of purpose. He was candid, patient and impartial.

Upon the declinature of William Smith, the office of Associate Justice was conferred upon John McKinley, of Alabama, who was commissioned in the recess April 22, 1837, and re-commissioned upon confirmation, September 25 of the same year. He was a native of Culpepper County, Virginia, where he was born upon the 1st of May, 1780. Removing to Kentucky, and subsequently to Alabama, he studied law, and became prominent at the Bar of Huntsville, where he



Engraved by Albert Rosenthal Phila. 1890

J. M. Hendry





soon acquired an influence in politics, which extended over the entire State, being chosen a member of the House of Representatives, and afterwards a member of the United States Senate, in place of Henry Chambers (deceased), in which body he served from 1826 until March 3, 1831, as a Jeffersonian Democrat. Having removed to Florence during his term, he was, on its conclusion, elected from the latter place a member of the 23rd Congress, and served continuously until 1835, when he was again sent to the Senate of the United States, from which he was transferred by President Van Buren to the Supreme Court. His death occurred in 1852. Although little known, even to the profession, he was described by Mr. Crittenden, then Attorney-General of the United States, as a candid, impartial and righteous judge, simple and unaffected in manners, bearing his honors meekly, without ostentation or presumption, shrinking from no responsibility and fearless in the performance of duty, while by Chief Justice Taney he was pronounced "a sound lawyer, faithful and assiduous in the discharge of his duties while his health was sufficient to undergo the labor. He was frank and firm in his social intercourse, as well as in the discharge of his judicial duties, and no man could be more free from guile or more honestly endeavor to fulfill the obligations which his office imposed on him."

Peter V. Daniel, of Virginia, was commissioned as Associate Justice, upon the 3d of March, 1841, upon the death of Justice Barbour. He was a native of Stafford County, Virginia, where he was born in 1785. He received from the ample means of his father the benefits of instruction by a private tutor, and was subsequently graduated from Princeton, in 1805. He read law under the direction of Edmund Randolph, the first Attorney-General of the United States,

whose youngest daughter he afterwards married. In 1809 he became a member of the Legislature, a year after his admission to the Bar. He also served as a member of the Privy Council until the adoption of the new Constitution, in 1830. The office of Attorney-General of the United States, vacated by the appointment of Mr. Taney to the Treasury Department, was tendered to him by President Jackson, but he declined the post, and it was conferred upon Mr. Benjamin F. Butler, of New York. Upon the transfer of Justice Barbour from the District Judgeship to the Supreme Bench, Mr. Daniel became his successor, and upon the death of Justice Barbour succeeded to the vacancy thus created, holding the position until his death, May 31, 1860. He wielded the pen of a ready writer, was a man of cultivated literary taste, and retained through life his familiarity with the classics, quoting Latin freely in his opinions. He was resolutely opposed to all extensions of national power and jurisdiction, and with Mr. Justice Woodbury dissented from the opinion of the Court in *Waring v. Clark*, extending the admiralty jurisdiction above tide-water upon the Mississippi, his dissent being marked by a vigorous course of reasoning and a profound knowledge of common law decisions, by which he sought to restrict the admiralty jurisdiction. His views were marked by a certain degree of eccentricity, and do not seem to have been shared by other members of the Court. They appear with particular prominence in the Passenger Cases and the License Cases, reported by Howard. So thoroughly infused was he with the doctrine of State sovereignty in its old sense, and so determined to magnify the State, that his conception of the grant to Congress of power to regulate interstate and foreign commerce was neither large nor comprehensive. He contributed but little to the development of the law and the



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Daniel



value of his opinions is mainly historical. The number of his dissenting opinions is remarkable, and even where he concurred in the judgment pronounced, he rarely acquiesced in the reasons assigned, preferring to state them in his own way.

Such were the Associates who surrounded Chief Justice Taney during the early part of his judicial career, and the effect of the radical change which had been made in the composition of the Bench was immediately noticeable in the first cases which came on for argument.

At the time of the death of Chief Justice Marshall three cases of unusual interest and importance were pending, involving the question of the Constitutionality of State laws. They had all been argued, and, as Judge Story intimates, although he and Marshall had been of the opinion that in each case the law criticized was unconstitutional, yet a marked difference of opinion among the Judges having arisen, the cases were assigned for re-argument. The re-argument took place before Chief Justice Taney and Mr. Justice Barbour, who appeared at the same time upon the Bench, and they, in association with Justices Thompson, McLean and Baldwin, constituted a majority of the Court whose judgment was exactly opposite in its effect to the line of precedents established during Marshall's long term of service.

The first case was that of *The Mayor of the City of New York v. Miln*.<sup>1</sup> The State of New York had, by Act of Assembly, required the master of every vessel arriving in the port of New York to report in writing respecting his passengers within twenty-four hours after arrival, and imposed a penalty upon non-performance of this duty. It was argued

<sup>1</sup> 11 Peters, 102 (1837).

that the case was governed by the decisions in *Gibbons v. Ogden* and *Brown v. The State of Maryland*, and that the statute was obnoxious to the Constitutional provision vesting in Congress the power to regulate commerce among the several States. It was held, however, by the majority of the Court, in an opinion delivered by Mr. Justice Barbour, that the statute did not amount to a regulation of commerce, but was a mere regulation of police, and was, therefore, clearly within the exercise of a power which rightfully belonged to a State. It was shown that in the first case the theatre on which the law operated was navigable water over which the power to regulate commerce extended; but in the case before the Court it was the territory of New York, over which the State had an undisputed jurisdiction for every purpose of internal regulation; besides, in the one case, the subject matter was a vessel; in the other, persons. "Persons," said the Court, "are not the subjects of commerce, and not being imported goods, the reason founded upon the construction of power given to Congress to regulate commerce, and prohibiting States from imposing a duty, does not apply."<sup>1</sup> Besides, there was no analogy between a tax imposed upon the sale of imported goods and the exercise of rights over persons

<sup>1</sup> This doctrine was controverted by the cases of *Smith v. Turner* and *Norris v. City of Boston*, 7 Howard, 283 (1849), in which it was determined, by a vote of five judges to four, that a State law imposing taxes upon the masters of vessels bringing passengers and immigrants into the ports of such States was contrary to the Constitution and void, the term "commerce" comprehending the intercourse of persons or passengers. The opinion of Mr. Justice Wayne is unusually interesting, and gives an insight into the inside history of the discussion in the consultation room. See also *Cooley v. The Board of Port Wardens of Philadelphia*, 12 Howard, 300 (1851), in which it is held that the grant of power to Congress does not deprive the States of the power to legislate on the subject of police and regulate pilotage fees and penalties for neglect or violation. It is interesting to note that in all these cases the opinion of the Court was far from being unanimous.

within the jurisdiction of the State. Justice Story dissented absolutely. Justice Thompson, while conceding the supremacy of an Act of Congress, contended that the State law was valid until Congress intervened by an Act with which the State law conflicted, and as no Act of Congress existed, no such conflict arose.

A second departure from the principles of Constitutional interpretation applied by Chief Justice Marshall is noticeable in the case of *Briscoe v. Bank of the Commonwealth of Kentucky*,<sup>1</sup> and the conclusion reached is in direct conflict with the case of *Craig v. State of Missouri*.<sup>2</sup> The question arose as to the meaning of the Constitutional prohibition upon the States against emitting bills of credit, and it was held, in an opinion by Justice McLean, that inasmuch as there was no limitation in the Constitution of the United States upon the power of a State to incorporate a Bank, such a power was incident to sovereignty, and inasmuch as the bills issued by the Bank were not bills of credit within the meaning of the Constitution,—that is, issued by a State, on the faith of the State, and designed to circulate as money,—the State law was a valid exercise of authority, and was therefore sustained. Justice Story again dissented, in terms of lament over the death of Marshall.

The third instance presented a striking contrast with the Dartmouth College case and *Fletcher v. Peck* in the almost equally celebrated case of *The Charles River Bridge v. The Warren Bridge*.<sup>3</sup> It is the first expression of opinion upon a Constitutional question by Chief Justice Taney, and is the first defeat sustained by Daniel Webster as counsel upon a question of Constitutional law.

<sup>1</sup> 11 Peters, 257 (1837).

<sup>2</sup> 4 Peters, 410 (1830).

<sup>3</sup> 11 Peters, 420 (1837).

As far back as 1650 there had been granted to Harvard College by the Legislature of the province of Massachusetts power to dispose of the ferry from Charlestown to Boston over the Charles River. The College received the profits from the ferry until 1785, when a Company was duly incorporated, under an Act of the Legislature, to build a bridge in place of the ferry and to receive tolls, the Company agreeing to pay to the College an annual rental which was ultimately to cease, and thereupon the bridge was to become the property of the State. The bridge was built and the rights of the College had still a considerable period to run when, in the year 1828, the Legislature incorporated another Company known as the Warren Bridge Company with power to erect a second structure over the same river between the same points in close proximity to the original bridge, with power to take tolls and ultimately to become free. The older corporation sought by injunction to restrain the exercise of the franchises of the younger company, and the decision of the State Court being in favor of the validity of the law conferring the privileges upon the defendants, the case was removed to the Supreme Court of the United States upon the ground that the State had exceeded her powers under the Constitution and had passed an act impairing the obligations of a contract. Much stress was laid in the argument upon the decisions of Chief Justice Marshall's time, and particularly the cases above referred to; but the decision of the Court sustained the sovereignty of the State in the exercise of its rights even though they might incidentally impair the value of a previous charter or contract. Chief Justice Taney based his opinion upon the broad principle that public grants were to be construed strictly, and that nothing passed by implication. Inasmuch as there was no express grant of an exclusive privilege to the plain-



tiffs in error, an implied contract to that effect could not be inferred. "We cannot," said he, "deal thus with the rights reserved to the States and by legal intendments and mere technical reasoning take away from them any portion of that power over their own internal police and improvement which is so necessary to their well-being and prosperity." No implied contract, he argued, could be created between the State and the Company from the very nature of the instrument in which the Legislature took the pains to use words which disavowed any intention on the part of the State to make such a contract; and in vindicating the reasons of public policy which lay at the basis of his judgment, he said:

"If this Court should establish the principles now contended for, what is to become of the numerous railroads established on the same line of travel with turnpike companies, and which have rendered the franchises of the turnpike corporations of no value? Let it once be understood that such charters carry with them these implied contracts, and give this unknown and undefined property in a line of travelling, and you will soon find the old turnpike corporations awakening from their sleep, and calling upon this Court to put down the improvements which have taken their place. The millions of property which have been invested in railroads and canals, upon lines of travel which had been before occupied by turnpike corporations, will be put in jeopardy. We shall be thrown back to the improvements of the last century, and obliged to stand still until the claims of the old turnpike corporations, shall be satisfied, and they shall consent to permit these States to avail themselves of the lights of modern science, and to partake of the benefit of those improvements which are now adding to the wealth and prosperity, and the convenience and comfort, of every other part of the civilized world."

The dissenting opinion of Mr. Justice Story, concurred in by Mr. Justice Thompson, is one of the most able and elaborate of his efforts. So despondent did he become of the fate of Federal supremacy that he wrote to Mr. Justice McLean:

"There will not I fear ever in our day be any case in which a law of a State or Act of Congress will be declared unconstitutional; for the old Constitutional doctrines are fast fading away, and a change has come over the public mind from which I augur little good." And even Chancellor Kent in a letter to Judge Story wrote: "I have lost my confidence and hopes in the Constitutional guardianship and protection of the Supreme Court."<sup>1</sup>

An able criticism of the decision of the majority of the Court appeared in the public prints, in which the writer, alluding to the three cases first considered, says: "In reviewing these decisions we perceive at once an altered tone and a narrower spirit, not only in Chief Justice Taney, but even in some of the old associates of Marshall, when they handle Constitutional questions. The change is so great and so ominous that a gathering gloom is cast over the future. We seem to have sunk the Constitution below the horizon, to have lost the light of the sun, and to hold on our way *per incertam lunam sub luce maligna*."

At this distance of time it is possible to form an unprejudiced judgment of the matter, and even the most ardent advocate of Federal supremacy can scarcely regret the decision of the Court in the Bridge case. It has enabled the States to push forward the great improvements by which the surface of the earth has been subjected to the dominion of man. The principle of the Dartmouth College Case was limited in its application before it had been carried to an extreme which would have left the State governments in possession of little more than the shell of legislative power. All the essential attributes of State sovereignty would have been parcelled out without the

<sup>1</sup> Life and Letters of Story, Edited by W. W. Story, Vol. II, p. 270. See also elaborate commentary in the "New York Review," (April, 1838.) Vol. II, p. 372.

possibility of reclamation, through recklessness or something worse, among a crowd of applicants for monopolistic privileges.<sup>1</sup>

Cases of great variety now presented themselves, displaying in a marked manner the ability and professional training of the Court. In *United States v. Laub*,<sup>2</sup> in an action on a treasury transcript, where the defendant's vouchers had been destroyed by fire, a nice question of evidence was discussed, and the production of secondary proof permitted; in *McKinney v. Carroll*,<sup>3</sup> it was held that to give the Supreme Court of the United States jurisdiction under the 25th section of the Judiciary Act, in a case brought from the highest Court of a State, it must be apparent in the record that the State Court did decide in favor of the validity of a statute of the State, the Constitutionality of which was brought into question; but when the decision of a State Court was against the validity of a State statute, as contrary to the Constitution, a writ of error would not lie.<sup>4</sup> In *United States v. Coombs*,<sup>5</sup> the Court dealt with an indictment for stealing merchandise belonging to a wrecked ship, the goods being above high water mark, and held that such an act could be punished, even though done on land, because the offence tended to interfere with, obstruct and prevent commerce and navigation, which were placed by the Constitution under the protection of Congress.

<sup>1</sup> See "Constitutional Development in the United States as influenced by Chief Justice Taney," by George W. Biddle, Esq., of Philadelphia. "Constitutional History as seen in American Law," p. 133.

<sup>2</sup> 12 Peters, 1 (1838). See also *Williams v. United States*, 1 Howard, 290 (1843).

<sup>3</sup> 12 Peters, 66 (1838).

<sup>4</sup> *Commonwealth Bank of Kentucky v. Griffith et al.*, 14 Peters, 56 (1840). So also *Walker v. Taylor et al.* 5 Howard, 65 (1847); *Commercial Bank of Cincinnati v. Buckingham's Executors*, *Ibid.*, 317 (1847).

<sup>5</sup> 12 Peters, 72 (1838).

In the *Mayor, etc., of Georgetown v. The Alexandria Canal Co., et al.*<sup>1</sup> they declined to prevent, by injunction, the construction of an aqueduct across the Potomac River, and in *Garcia v. Lee*,<sup>2</sup> a case arising under a Spanish grant, held that a boundary line determined on as the true one by the political departments of the government must be also recognized as the true one by the judicial department.

A similar principle was announced in *Williams v. The Suffolk Insurance Company*,<sup>3</sup> where it was held that when the executive branch of the Government, which is charged with the foreign relations of the United States, shall, in its correspondence with a foreign nation, assume a fact in regard to the sovereignty of any country, it is conclusive on the judicial department.

A case now arose involving an interesting political question, and attracting public attention. Amos Kendall, the Postmaster General, had been directed by an Act of Congress to credit certain mail contractors with the amount of a sum of money awarded by the Solicitor of the Treasury as due to them under contracts with the Government. The Postmaster General refused to sanction the award, on the ground that the Solicitor had exceeded his authority. The mail contractors applied to the Circuit Court for a mandamus to compel the Postmaster General to pay them the award. This being granted, the cause was brought up on writ of error.<sup>4</sup> It was contended that the proceedings were intended to enforce the performance of an official duty and were a direct infringement on the Executive department; that the Postmaster General was alone subject to the direction and control of the President. These propositions were denied by the Court, the Chief Justice and

<sup>1</sup> 12 Peters, 91 (1838).

<sup>2</sup> *Ibid.*, 511 (1838).

<sup>3</sup> 13 Peters, 415 (1839).

<sup>4</sup> *Kendall v. The United States*, 12 Peters, 524 (1838).

Justices Barbour and Catron dissenting. It was held that the mandamus did not seek to direct or control the discharge of an official duty, but to enforce the performance of a ministerial act, which neither the Postmaster General nor the President had any authority to deny or control. The President was not invested with a dispensing power; such a doctrine could not be tolerated; it would clothe the President with a power to control the legislation of Congress, and paralyze the administration of justice. Such a construction of the Constitution would be novel and entirely inadmissible. In interesting contrast with this case is that of *Susan Decatur*, the widow of Captain Stephen Decatur, against James K. Paulding, the Secretary of the Navy,<sup>1</sup> in which an application for a mandamus, commanding the Secretary to pay a pension and arrearages, had been refused by the Circuit Court of the District of Columbia. In sustaining the judgment the Court, through the Chief Justice, held that as it was a matter in which the Secretary must exercise a discretion, and was not a mere ministerial act, the Court could not guide or control him in the performance of his official duties. While still later, in *Kendall v. Stokes*,<sup>2</sup> where a suit had been brought against the Postmaster General for damages in consequence of acts which the Court in its first decision had held to be official and not ministerial, the principle was asserted that a public officer acting from a sense of duty, in a matter where he was required to exercise discretion, could not be held liable to an action for an error of judgment.

So too, in *Ex parte Hennen*,<sup>3</sup> it was held that the Supreme Court could have no control over the appointment or removal of a clerk of the District Court, or entertain any inquiry into

<sup>1</sup>*Decatur v. Paulding*, 14 Peters, 497 (1840).

<sup>2</sup>3 Howard, 87 (1845).

<sup>3</sup>13 Peters, 230 (1839).

the grounds of the removal. "If the judge of the District Court be chargeable with any abuse of power the Supreme Court is not the tribunal to which he is amenable."

In all of these cases it is manifest that the Court had no disposition to encroach upon the proper jurisdiction of other departments of the government, or other tribunals.

In *McElmoyle v. Cohen*<sup>1</sup> it was held that though the judgment of a Court in one State is conclusive in another State upon the merits, yet it does not carry with it sufficient efficacy to be enforced by execution. It must be reduced to a new judgment in the new forum, and is subject to all laws relating to the remedy provided there. Hence the plea of the Statute of Limitations in an action instituted in one State on a judgment obtained in another is a plea to the remedy, and the *lex fori* must prevail.

About this time a controversy arose between the States of Rhode Island and Massachusetts<sup>2</sup> relative to the boundary line between them, in which Massachusetts was finally successful. Although the Court, through Mr. Justice Baldwin, sustained its jurisdiction to hear and determine a controversy between States, on the ground that the suit was brought to try a right of property in the soil and other rights properly the subject of judicial cognizance, yet the Chief Justice dissented from this view, and contended that this power does not extend to a suit brought to determine political rights, sovereignty and jurisdiction being questions outside of the pale of judicial authority, and not, therefore, within the grant of judicial power contained in the Constitution.

In 1839 the case of the *Bank of Augusta v. Earle*,<sup>3</sup> and

<sup>1</sup> 13 Peters, 312 (1839).

<sup>2</sup> *The State of Rhode Island v. The State of Massachusetts*, 12 Peters, 657 (1838); *Ibid.*, 4 Howard, 591 (1846).

<sup>3</sup> 13 Peters, 519 (1839).

two other cases depending upon the same principle,<sup>1</sup> came before the Court, presenting the sovereignty of the States in a new aspect,—in relation to their authority to create corporations, and the rights and powers of the corporations of one State to act within the territorial jurisdiction of another. It was clear that the law of comity which prevails between independent nations, and which entitles the corporations created by one sovereignty to make contracts in another and to sue in its Courts, prevailed among the States of the Union. "The States of the Union," said the Chief Justice, "are sovereign States, and the history of the past and the events which are daily occurring furnish the strongest evidence that they have conducted towards each other the laws of comity in their fullest extent." In the *Tombigbee Railroad Company v. Kneeland*,<sup>2</sup> it was held, in confirmation of this principle, that a contract made in Alabama by the agents of a corporation created by the laws of Mississippi was valid and must be sustained.

The status of a corporation was further considered in *The Commercial and Railroad Bank of Vicksburg v. Slocumb*,<sup>3</sup> where Mr. Justice Barbour, in affirming *Strawbridge v. Curtiss*<sup>4</sup> and *Bank of the United States v. Deveaux*,<sup>5</sup> held that, while a corporation aggregate was not a citizen as such, and therefore could not sue in the Courts of the United States as such, yet the Court would look beyond the mere corporate character to the individuals of whom it was composed, and if they were citizens of a different State from the party sued, they were competent to sue in the Federal Courts. But all

<sup>1</sup> *Bank of the U. S. v. Primrose*, 13 Peters, 519 (1839). *Railroad Co. v. Earle*, *Ibid.* 519 (1839).

<sup>2</sup> 4 Howard, 16 (1846).

<sup>3</sup> 14 Peters, 60 (1840). See also *Irvine v. Lowry*, *Ibid.* 293 (1840).

<sup>4</sup> 3 Cranch, 267 (1806).

<sup>5</sup> 5 Cranch, 61 (1809).

the corporators must be citizens of a different State from the party sued.

But in the case of the *Louisville, Cincinnati and Charleston R. R. Co. v. Letson*,<sup>1</sup> the important principle was established that a corporation is to be deemed an inhabitant of the State creating it, capable of being treated as a citizen for all the purposes of suing and being sued.

The doctrine was expanded from time to time<sup>2</sup> until the Court reached the point, which has proved so satisfactory in practice, that a naked averment that a certain company was a citizen of a State was sufficient to give jurisdiction to the Federal Courts, because the company was incorporated by a public statute of the State which the Court was bound to notice judicially.<sup>3</sup> And still later it was determined that a suit by or against a corporation in its corporate name must be presumed to be a suit by or against citizens of the State which created it, and no averment or evidence to the contrary is admissible for the purpose of withdrawing the suit from the Federal jurisdiction.<sup>4</sup>

The powers of a corporation beyond the territorial limits of the sovereignty which created it were still further considered in *Runyan v. The Lessee of Coster et al.*<sup>5</sup> A New York corporation was held to be capable of holding lands in the State of Pennsylvania subject to be divested by proceedings in due course of law, instituted by the Commonwealth alone and for its own use. Every power which a corporation exercises in another State depends for its validity upon the laws of the sov-

<sup>1</sup> 2 Howard, 497 (1844).

<sup>2</sup> *Railroad Co. v. Kneeland*, 4 Howard, 16 (1846).

<sup>3</sup> *Covington Drawbridge Co. v. Shepherd*, 20 Howard, 227 (1857).

<sup>4</sup> *Ohio & Mississippi R. R. Co. v. Wheeler*, 1 Black, 286 (1861).

<sup>5</sup> 14 Peters, 122 (1840).



ereignty in which it is exercised; and a corporation can make no valid contract without the sanction, express or implied, of such sovereignty unless a case should be presented in which the right claimed should appear to be secured by the Constitution of the United States.

The pendulum was not permitted, however, to swing too far in any one direction. An illustration of the limited powers of the States is presented in *Suydam and Boyd v. Broadnax and Newton*,<sup>1</sup> where an act of insolvency, executed under the authority of the State of Alabama, was held to be no bar to a recovery in an action brought in the Circuit Court of the United States for the Alabama District, upon a contract made in New York. No State, however sovereign, could deny the right to recover upon contracts made outside of its own limits. Such contracts would still exist and continue to be enforceable according to the *lex loci contractus*.

A few years later the case of *Bronson v. Kinzie*,<sup>2</sup> raised the question of the legality of a law of the State of Illinois passed subsequent to a mortgage contract providing that the equitable estate of a mortgagor should not be extinguished for twelve months after a sale under a decree of chancery and that there should be no sale unless two-thirds of the amount at which the property had been valued by appraisers should be bid therefor. The law was held to be null and void on the ground that it violated a Constitutional provision prohibiting the passage of any law impairing the obligation of a contract. From this judgment Mr. Justice McLean dissented, drawing the somewhat subtle distinction that the State law acted upon the remedy and not upon the contract.

This case was followed and confirmed within a year in

<sup>1</sup> 14 Peters, 67 (1840).

<sup>2</sup> 1 Howard, 311 (1843).

*McCracken v. Hayward*.<sup>1</sup> And in two cases, decided in 1848, a State law, prohibiting banks, previously empowered by charter, from transferring bills and notes, was held to be unconstitutional, because it impaired the obligation of a contract.<sup>2</sup>

A singular case now arose involving the relations to each other of the different counties constituting the District of Columbia, and it was held that they did not occupy the relation borne by the States of the Union to each other. As they constitute together one territory, united under one territorial government, the residents of the county of Alexandria are not *beyond seas* in relation to the county of Washington, even though on a proper construction of the Maryland statute of limitations the words "beyond seas" are equivalent to the words *without the jurisdiction of the State*.<sup>3</sup>

In *The United States v. Morris*,<sup>4</sup> a question arose upon an indictment for a violation of an act prohibiting the slave trade, and the Court held that though in expounding a penal statute, it will not be extended beyond the plain meaning of its words, yet the evident intention ought not to be defeated by a forced or over-strict construction. Hence it was not necessary to constitute the offence described in the Act of Congress that there should have been an actual transportation or carrying of slaves in a vessel of the United States in which the prisoner served; it was sufficient if the vessel were engaged and under contract for the purpose.

The session of 1841 was memorable for the discussion and decision of several cases of unusual importance and mag-

<sup>1</sup> 2 Howard, 608 (1844).

<sup>2</sup> *Planters' Bank of Mississippi v. Sharp et al.*; *Baldwin et al. v. Payne et al.*, 6 Howard, 301 (1848).

<sup>3</sup> *Bank of Alexandria v. Dyer*, 14 Peters, 141 (1840).

<sup>4</sup> 14 Peters, 464 (1840).

nitude. Among them was the Florida Land Claim, reported under the title of *Mitchel v. The United States*,<sup>1</sup> involving the title to the Fortress of St. Mark, the most ancient structure in America, antedating by seven years the Massacre of St. Bartholomew. Another is the case of the *Amistad*,<sup>2</sup> in which free negroes, who had been kidnapped in violation of the laws of Spain denouncing the slave trade as a heinous offence, were restored to freedom through the efforts of the venerable ex-President, John Quincy Adams, who, after an absence of nearly forty years from the bar, re-appeared as one of the counsel in behalf of the African appellees. The case of *Groves v. Slaughter*,<sup>3</sup> was one on the determination of which more than \$3,000,000 depended, at that time a sum of much magnitude, but it is chiefly interesting as involving a discussion whether the grant of power to Congress to regulate commerce among the States vests in Congress power to regulate the traffic in slaves among the different States, and if so, whether it does not carry with it an implied prohibition on the States from making any regulations on the subject. The Constitution of Mississippi, adopted in 1832, had prohibited the introduction of slaves into that State after May 1, 1833 as merchandize or for sale. No law to enforce this constitutional provision was passed until 1837. In 1835, however, a non-resident had imported certain slaves for sale, and defence was taken to a note given by the purchaser in payment upon the ground that it was void, as in violation of the Constitutional provision. It was held that the Constitution of the State was not self-enforcing, and as the Act carrying its provisions into effect was subsequent in date to the note, that the sale was valid, and that recovery could be had. Justices Story and McKinley dis-

<sup>1</sup> 15 Peters, 52 (1841).

<sup>2</sup> 15 Peters, 518 (1841).

<sup>3</sup> 15 Peters, 449 (1841).

sented. Chief Justice Taney and Mr. Justice McLean believed that the power over slavery belonged exclusively to the States, that it was local in its character, and that the action of the State upon the subject could not be controlled by Congress either by its power to regulate commerce, or by virtue of any other power conferred by the Constitution. Justices Story, Thompson, Wayne and McKinley were of the opinion that the provision for the regulation of commerce did not interfere with the provision of the Constitution of Mississippi.

Another phase of the same question arose in *Rowan et al. v. Runnels*.<sup>1</sup> The Constitution of Mississippi went into operation May 1, 1833, and on the 13th of May of that year, an act was passed to give effect to its provisions. The Court adhered to the construction of the Constitution stated in *Groves v. Slaughter*, and enforced contracts made between the days mentioned, although the Courts of Mississippi had, since that decision declared such contracts to be void. "We can hardly be required," said the Chief Justice, "by any comity or respect for the State courts to surrender our judgment to decisions since made in the State, and declare contracts to be void which upon full consideration we have pronounced to be valid. Undoubtedly this court will always feel itself bound to respect the decisions of State Courts, and from the time they are made will regard them as conclusive in all cases upon the construction of their own Constitutions and laws. But we ought not to give to them a retroactive effect, and allow them to render invalid contracts entered into with citizens of other States, which in the judgment of this Court were lawfully made."

Mr. Justice Daniel dissented, holding that the construc-

<sup>1</sup> 5 Howard, 134 (1847). These cases were again affirmed in *Sims v. Hundley*, 6 Howard, 1 (1848).

tion of a State Constitution by the State tribunals was conclusive, and it was wholly immaterial when the decision was made.

In the case of *Martin et al. v. The Lessee of Waddell*,<sup>1</sup> a case brought up from New Jersey, and involving immense interests, the entire proprietary right of the State under the grant of Charles II to the Duke of York, subsequently vested in the East Jersey Proprietors, was elaborately traced, and applied to a proprietary grant of a certain portion of the bed of the Raritan River and Bay, the grantee claiming an exclusive right of fishing for oysters. It was held by the Court that the navigable waters of New Jersey had passed to the Duke of York and to the Proprietors, but they passed as a part of the prerogatives and rights annexed to the political powers conferred upon the Duke, and not as a private property, to be parceled out and sold to individuals; that the right of fishery was a part of those prerogative rights, and that after the period of the Revolution the prerogatives and regalities which had formerly belonged to the crown became immediately and rightfully vested in the State, and that, therefore, any exclusive right on the part of a citizen to fish in the navigable waters of New Jersey was declared to be unfounded.

About this time the case of *Swift v. Tyson*<sup>2</sup> came before the Court, in form merely an action upon a bill of exchange accepted in New York, instituted by the holder, a citizen of the State of Maine, in the Circuit Court of New York, but containing a fruitful germ which has expanded into a system of general commercial jurisprudence, the establishment of which has provoked much adverse comment and discussion,

<sup>1</sup> 16 Peters, 367 (1842).

<sup>2</sup> 16 Peters, 1 (1842).

both among writers and the State judges, it being asserted by one of them, and he not the least able of our jurists, that since "the unfortunate mis-step that was made in the opinion in *Swift v. Tyson*, the Courts of the United States have persisted in the recognition of a mythical commercial law, and have professed to decide so-called commercial questions by it, in entire disregard of the law of the State where the question arose."<sup>1</sup>

The acceptance and endorsement of the bill were admitted, and the defense was rested on an allegation that the bill had been received in payment of a pre-existing debt, and that the acceptance had been given for lands which the acceptor had purchased from the drawer of the bill to which the drawer had no title, and further that the quality of the lands had been misrepresented, and the purchaser imposed upon by the fraud of the drawer. The bill accepted had been received *bona fide* and before maturity. It was held in the lower court that the later decisions of the Supreme Court of New York had established that the receipt of a note in payment of a pre-existing debt, was not such a receipt in the usual course of trade as to give the endorsee any rights on the paper beyond those against the endorser; and it was contended that the Thirty-fourth section of the Judiciary Act of 1789, which declared "that the laws of the several States, except where the Constitution, treaties or statutes of the United States shall otherwise recognize or provide, shall be regarded as rules of decision in trials at common law in the Courts of the United States, in cases where they apply," forbade the Supreme Court from departing from the view taken by the State tribunal. It was ruled by Mr. Justice Story that the

<sup>1</sup> Mr. Justice Mitchell in *Forepaugh v. R. R. Co.*, 128 Penna. St., 228 (1889.)

holder was not affected by equities between the original parties; that the Thirty-fourth section of the Judiciary Act had been uniformly limited in its application to State laws strictly local; that is to say, to the positive statutes of the State, and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intra-territorial in their nature and character, but that it does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought not in the decisions of the local tribunals, but "in the general principles and doctrines of commercial jurisprudence." This language has become the foundation of the doctrine that even in suits where the Federal jurisdiction is invoked solely on the ground of the citizenship of the parties, and not because of any distinct Federal question, the Federal courts will decide the point of law involved according to their own view of general jurisprudence, although it lead to an absolute lack of recognition of precedents in the State courts in which the controversy arose.<sup>1</sup> It was some time, however, before so definite a result was reached. In 1845 the Court through Mr. Justice McLean applied this doctrine to the construction of a will, and said: "The mere construction of a will by a State Court does not, as the construction of a statute of the State, constitute a rule of decision for the Courts of the United States." From this Mr. Justice McKinley dissented in a powerful opinion in which he pointed out the probable consequences of the doctrine, the contests that would ensue, and the dangers to the

<sup>1</sup> See "American Law Review," Vol. VIII., 452, "Decisions of the Federal Courts on Questions of State Law," by W. M. Meigs, of Philadelphia. See also Hare on Constitutional Law, Vol. II., 1107, 1117, and Lecture 51 *passim*.

peace and harmony of the people of the United States. In this view Chief Justice Taney concurred.<sup>1</sup>

But the most important of all the cases considered at this time was that of *Prigg v. Commonwealth of Pennsylvania*<sup>2</sup> and it afforded an opportunity to Judge Story, one of the last in his long judicial career, of declaring a State law unconstitutional and void. Although the judgment of the Court was unanimous, it is to be remarked that the Chief Justice and several of his associates did not concur in the reasoning and principles laid down in the opinion of the majority.

Prigg, a citizen of Maryland, had taken a fugitive slave by force from Pennsylvania, without the certificate required by the Act of Congress of 1793, and had carried her to the State of Maryland to her owner. For this act he had been indicted under a law of the State of Pennsylvania, passed for the purpose of giving effect to the provisions of the State Constitution relative to fugitives from labor, and to prevent kidnapping, which declared that the taking and carrying away of any negro or mulatto by force or violence from the State should be deemed a felony punishable by fine and imprisonment. The act also provided a mode for the rendition of fugitive slaves by the State authorities. The fugitive slave had been brought by virtue of this law before a Pennsylvania magistrate, who refused to take jurisdiction, and Prigg had thereupon of his own will carried her off to Maryland, acting under the authority of the owner. It was held that the Pennsylvania law was unconstitutional, because the Constitution of the United States, in providing that fugitives should be delivered up, placed the remedy exclusively in Congress,

<sup>1</sup> *Lane v. Vick*, 3 Howard, 464 (1845). See *contra* the earlier cases of *Jackson v. Chew*, 12 Wheaton, 153 (1827), and *Henderson et ux. v. Griffin*, 5 Peters, 151 (1831).

<sup>2</sup> 16 Peters, 539 (1842).



and therefore the States were prohibited from passing any law upon the subject, whether Congress had or had not legislated upon the question. Although concurring in the result, the Chief Justice dissented from the reasons given by the majority of the Court, stating that the Constitution contained no words prohibiting the several States from passing laws to enforce the right. It is true that they were in express terms forbidden to make any regulation which could impair it, but there the prohibition stopped, and he saw no reason, in the absence of any express prohibition, for establishing a different rule, where, by national compact, the right of property in slaves was recognized as an existing right in every State of the Union.

Justices Thompson and Daniel also delivered opinions to the same effect, but concurred in the judgment of reversal, on the ground that Congress by the act of 1793 had exercised its Constitutional power, and as the Pennsylvania law conflicted with it, the State law was null and void. We find interesting fragments of a state of society that has perished, in *Williams v. Ash*,<sup>1</sup> a solemn adjudication that the bequest of freedom to a slave is a specific legacy, and in *Rhodes v. Bell*<sup>2</sup> that the purchase of a slave in one county in the District of Columbia and sale in another entitles him to freedom, and in *Adams v. Roberts*<sup>3</sup> where an ancient manumission deed was admitted in evidence on the trial of a petition for freedom by the child of the manumitted slave. In *Jones v. Van Zandt*<sup>4</sup> the question of what facts amounted to a "harboring" of a fugitive slave, was considered, and it was held that the fugitive slave law of 1793 was constitutional and not in conflict with the Ordinance for the government of the

<sup>1</sup> 1 Howard, 1 (1843).

<sup>2</sup> 2 Howard, 397 (1844).

<sup>3</sup> 2 Howard, 487 (1844).

<sup>4</sup> 5 Howard, 215 (1847).

Territory Northwest of the River Ohio. The Court refused to notice "the supposed inexpediency and invalidity of all laws recognizing slavery or any right of property in man. That," said Mr. Justice Woodbury, "is a political question, settled by each State for itself; and the Federal power over it is limited and regulated by the people of the States in the Constitution itself, as one of its sacred compromises, and which we possess no authority as a judicial body to modify or overrule."

Passing from Constitutional questions to those cases which illustrate the boundless variety of topics discussed, we find the doctrine laid down by Lord Camden examined and confirmed: that a court of equity, which is never active in relief against conscience or public convenience, has always refused its aid to stale demands, where the party has slept upon his rights for a great length of time. Nothing but conscience, good faith, and reasonable diligence can call the court into activity. Where these are wanting, the court is passive and does nothing; laches and neglect are always discountenanced; and therefore, from the beginning of equity jurisdiction there was always a limitation of suits.<sup>1</sup>

In *Porterfield's Executors v. Clark's Heirs*,<sup>2</sup> a question arose under the Virginia statutes establishing a land office, and the boundaries of the territory appropriated to the Cherokees, as fixed by treaties, were historically examined by Mr. Justice Catron in one of those opinions discussing Western titles by which he justified his well established reputation as a master of one of the most intricate and perplexing systems of local real estate law.

In *Vidal et al. v. Girard's Executors*,<sup>3</sup> elaborately argued

<sup>1</sup> *Bowman et al. v. Wathen et al.*, 1 Howard, 189 (1843).

<sup>2</sup> 2 Howard, 77 (1844).

<sup>3</sup> 2 Howard, 127 (1844).

by Webster and General Walter Jones on the one side, and by Horace Binney and John Sergeant on the other, the law of public charities, of superstitious uses, and of the right of a testator, to control the direction of his gift were most exhaustively considered by Mr. Justice Story in an opinion replete with interest. Mr. Binney won the most splendid of his professional triumphs, and obtained the crown which he wore with so much modesty.<sup>1</sup> The testator, Stephen Girard, whose name has since become, through the success of Binney, a synonym for charity, had excluded all ecclesiastics, missionaries and ministers of every sort from holding or exercising any station or duty in the college he sought to found, or even visiting the same; and had limited the instruction to be given to the scholars to pure morality, general benevolence, a love of truth, sobriety and industry. These provisions were bitterly assailed by Webster, who declared, in terms which show how little knowledge of the future is vouchsafed even unto the wisest: "No good can be looked for from this college. If Girard had desired to bring trouble, and quarrel, and struggle upon the city, he could have done it in no more effectual way. The plan is unblessed in design and unwise in purpose. If the court should set it aside, and I be instrumental in contributing to that result, it will be the crowning mercy of my professional life." To this the Court, through the lips of Story, replied: "The testator does not say that Christianity shall not be

<sup>1</sup> It was during the evening of the day upon which Mr. Binney closed his triumphant argument, that President Tyler offered the place made vacant in the Supreme Court by the death of Mr. Justice Baldwin, first to Mr. Sergeant, and then to Mr. Binney. Both declined to accept it, each alleging that he was over sixty years of age, and had determined to accept no public office. Each requested that the place be offered to the other, and that the fact he had declined and his reasons for doing so be kept secret from the other. "*Seven Decades of the Union*," by Henry A. Wise, p. 219.

taught in the college. But only that no ecclesiastic of any sect shall hold or exercise any station or duty in the college. Suppose, instead of this, he had said that no person but a layman shall be an instructor or officer or visitor in the college, what legal objection could have been made to such a restriction? And yet the actual prohibition is in effect the same in substance. But it is asked: why are ecclesiastics excluded, if it is not because they are the stated and appropriate preachers of Christianity? The answer may be given in the very words of the testator. 'In making this restriction,' says he, 'I do not mean to cast any reflection upon any sect or person whatsoever. But as there is such a multitude of sects and such a diversity of opinion amongst them, I desire to keep the tender minds of the orphans, who are to derive advantage from this bequest, free from the excitement which clashing doctrines and sectarian controversy are so apt to produce.' . . . Looking to the objection, therefore, in a mere juridical view, which is the only one in which we are at liberty to consider it, we are satisfied that there is nothing in the devise establishing the college, or in the regulations and restrictions contained therein, which are inconsistent with the Christian religion, or are opposed to any known policy of the State of Pennsylvania."

The Myra Clark Gaines case, which came frequently before the Court, and with varying chances of success until it ripened into a victory for the claimant, attracted an extraordinary degree of public interest, not only on account of the large amount of property involved, but because of the romantic nature of the history upon which it turned. The character of the case can be best summarized in the words of Mr. Justice Grier, when dissenting from the opinion of the majority of the Court, both as to the law and the facts: "I do not

think it necessary to vindicate my opinion by again presenting to the public view a history of the scandalous gossip which has been buried under the dust of half a century and which a proper feeling of delicacy should have permitted to remain so. I therefore dismiss the case as I hope for the last time, with the single remark that if it be the law of Louisiana that a will can be established by the dim recollections, imaginations or inventions of anile gossips after forty-five years to disturb the titles and possessions of *bona fide* purchasers without notice of an apparently indefeasible legal title, *haud equidem invideo, miror magis.*"<sup>1</sup>

Two cases occur in counterpart:—in one it was held that a person in custody under a writ issued from a United States Court could not be legally discharged from imprisonment by a State officer acting under a State insolvent law; in the other it was held that no United States Court or judge could issue a *habeas corpus* to bring up a prisoner who is in the custody of a State Court for any other purpose than to be held as a witness.<sup>2</sup>

In the case of *Neil Moore & Co. v. The State of Ohio*,<sup>3</sup> the controversy arose out of the cession of that part of the Cumberland Road lying within the limits of Ohio and the State legislature accepting the same, and the Court, adhering to views already expressed in the case of *Searight v. Stokes*,<sup>4</sup> held that tolls charged upon passengers traveling in mail coaches, but not charged against passengers traveling in other coaches were against the contract and void, and that while

<sup>1</sup> *Gaines and wife v. Chew*, 2 Howard, 619 (1844). *Patterson v. Gaines*, 6 Howard, 550 (1848). *Gaines v. Relf et al.*, 12 Howard, 473 (1851). *Gaines v. Hennen*, 24 Howard, 553 (1860).

<sup>2</sup> *Duncan v. Darst et al.*, 1 Howard, 301 (1843); *Ex parte Dorr*, 3 Howard, 104 (1845).

<sup>3</sup> 3 Howard, 720 (1845).

<sup>4</sup> 3 Howard, 151 (1845).

the frequency of the departure of coaches carrying the mails was not an abuse of the privilege of the United States, yet an unnecessary division of the mail matter among a number of coaches was. The principle involved in both cases was that a State could not impose a toll on carriages employed in transporting the mail, because such a carriage must be held to be laden with the property of the United States, and a State could not tax a national agency. The exemption was not pushed, however, so as to include other property in the same vehicle, or persons traveling in it, except where they were discriminated against.

In the important case of *The State of Maryland v. The Baltimore & Ohio Railroad Co.*,<sup>1</sup> the State of Maryland had passed an act directing a large money subscription to the capital stock of the railroad company, provided "that if the Company shall not locate its road in the manner provided in the Act it should forfeit one million dollars to the use of Washington County." By a subsequent act, so much of the first act as made it the duty of the Company to construct the road upon the route prescribed, was repealed and the penalty was remitted and released. Suit was brought for the penalty, and the Supreme Court held, through the Chief Justice, that the second act of assembly did not impair the obligation of a contract, inasmuch as the effect of the first act was the imposition of a penalty by the State, which it had the right to remit, even after suit had been brought for its recovery. The scope of the law showed that it was legislation for State purposes, and a measure of State policy, which the State had a right to change at its pleasure; and neither the county nor any of its citizens had acquired private in-

<sup>3</sup> Howard, 534 (1845).

terests which could be defended and maintained in a court of justice.

In the January Term of 1847, several celebrated cases came before the Court known as the License cases,<sup>1</sup> all of which arose under the much discussed clause of the Constitution vesting power in Congress to regulate commerce. The precise point involved in the first two cases was, whether a State might assume to regulate or prohibit the retail of wines and spirits, the importation of which from foreign countries had been authorized by an Act of Congress, and in the last case, whether a State might prohibit by law the sale of liquor imported from another State, there being no Act of Congress to regulate such importation. In the decision of all these cases it was unanimously determined that the laws under review were valid and Constitutional. There was much diversity of opinion, however, as to the principles upon which the cases should be decided, six judges writing nine opinions. It was fully admitted by all that if the State laws were in collision with an Act of Congress they would be unconstitutional and void. If in the Massachusetts and Rhode Island cases the law had obstructed the importation or prohibited the sale of the articles in the original cask or vessel, in the hands of the importer, it would have been void; because the importation was permitted by Congress in the exercise of its Constitutional power to regulate foreign commerce; but the State laws, so the Chief Justice contended, were framed to act upon the article after it had passed the line of foreign commerce into the hands of the dealer, and had thus become a part of the general mass of the property of the State. This, he insisted, was directly within the principle as well as the lan-

<sup>1</sup>Thurlow *v.* Massachusetts, Fletcher *v.* Rhode Island, Peirce *et al.* *v.* New Hampshire, 5 Howard, 504 (1847).

guage of the opinion of Chief Justice Marshall in the case of *Brown v. Maryland*.<sup>1</sup>

The New Hampshire case differed from the two former in several important particulars. The law prohibited the sale, in any quantity, without license, and the sale had been made by the importer, in the original package in which the liquor had been imported from Massachusetts into New Hampshire. The case, therefore, turned, in the judgment of the Chief Justice, upon the question whether, in the absence of an Act of Congress regulating commerce between the States, all State laws on the subject were null and void. In other words, whether the mere grant of power to the General Government could be construed as an absolute prohibition to the exercise of any power over the same subject by the States. It was upon this question that a diversity of sentiment existed among the members of the Court, just as it had arisen in the case of *Prigg v. Commonwealth of Pennsylvania*. The view of the Chief Justice was expressed in the following language; "The controlling and supreme power over commerce with foreign nations and the several States is undoubtedly conferred upon Congress, yet, in my judgment, the State may, nevertheless, for the safety or convenience of trade, or for the protection of the health of its citizens, make regulations of commerce for its own ports and harbors, and for its own territory; and such regulations are valid, unless they come in conflict with the law of Congress."

Mr. Justice McLean contended that the State laws did not prohibit the sale of foreign spirits, but simply required a license to sell. A license to sell an article, foreign or domestic, as a merchant, or inn-keeper, or victualler, is a matter of

<sup>1</sup> 12 Wheaton, 419 (1827).



police and revenue, within the power of a State. It is strictly an internal regulation, and cannot come in conflict, saving the rights of the importer to sell, with any power possessed by Congress. To reject this view would make the excess of the drunkard a constitutional duty to encourage the importation of ardent spirits. In the New Hampshire case he held that the word "import," in a commercial sense, meant goods brought from abroad, and did not apply to the transportation of an article from one State to another. Justices Catron, Daniel, Woodbury and Grier had each his own mode of stating his reasons, though all arrived at the same result.

The interest of these cases is enhanced by the later case of *Cooley v. Board of Port Wardens*<sup>1</sup> and the recent decision of *Leisy v. Hardin*,<sup>2</sup> known as the "Original Package Case," in which the decision in *Peirce v. New Hampshire* was distinctly overruled, Chief Justice Fuller there holding: "The conclusion follows that, as the grant of power to regulate commerce among the States, so far as one system is required, is exclusive, the States cannot exercise that power without the assent of Congress, and, in the absence of legislation, it is left for the Courts to determine when State action does or does not amount to such exercise, or, in other words, what is or is not a regulation of such commerce."

In the case of *Cook v. Moffat*,<sup>3</sup> the question of the effect of a debtor's discharge under the insolvent laws of one State on a contract made in another State was again discussed, and decided in conformity with the decisions in *Ogden v. Saunders* and *Boyle v. Zacharie*, and it was held that the State Courts were bound to conform to the decisions of the Supreme Court of the United States declaring State laws unconstitutional.

<sup>1</sup> 12 Howard, 299 (1851).

<sup>2</sup> 135 U. S. Rep. 100 (1889).

<sup>3</sup> 5 Howard, 295 (1847).

At this term the important admiralty case of *Waring v. Clarke*<sup>1</sup> was decided, in which the attention of the Court was called to the question for the first time whether the admiralty jurisdiction conferred by the Constitution was to be limited to what were well-recognized cases of admiralty jurisdiction in England at the time of the adoption of the Constitution, or whether that jurisdiction in a public navigable river extended beyond the ebb and flow of the tide. The collision complained of had taken place on the Mississippi River at a point where there was much doubt whether the tide ebbed and flowed. The majority of the Court, however, thought that there was sufficient proof of a tidal flow, and consequently it was not necessary to consider whether the admiralty jurisdiction extended higher. But the case is remarkable for the powerful dissenting opinions of Woodbury and Daniel, in which they pleaded for the restriction of the admiralty jurisdiction in opposition to the principles so ably contended for by Mr. Justice Wayne, and subsequently sustained by Chief Justice Taney in the case of the *Genesee Chief*, in which he asserted the bold and comprehensive doctrine that the admiralty power of the Court extended beyond the flow of the tide in all public navigable waters, and even over the great fresh water lakes.<sup>2</sup>

The class of cases known as the Passenger Cases<sup>3</sup> arose under the same Constitutional provision which had been involved in the discussion of the License Cases. The question was presented whether a law of the State of New York imposing a tax upon the masters of vessels arriving from a

<sup>1</sup> 5 Howard, 441 (1847).

<sup>2</sup> See, as to the admiralty jurisdiction on Long Island Sound, *The New Jersey Steam Nav. Co. v. The Merchants' Bank*, 6 Howard, 344 (1848).

<sup>3</sup> *Smith v. Turner*, *Norris v. City of Boston*, 7 Howard, 283 (1849).

foreign port, upon each steerage passenger and each cabin passenger, and upon the masters of coasting vessels for each passenger, was repugnant to the Constitution of the United States. Two points were distinctly presented: Is the power to regulate commerce exclusively vested in Congress? Is a tax upon persons a regulation of commerce? Upon both these points it was claimed upon the argument that they had been repeatedly settled by solemn judgments, notably in *Gibbons v. Ogden* and *Brown v. Maryland*. Against these, the principle of *New York v. Miln* was cited. The result of the deliberations of the consultation room and the judgment of the Court left both questions in an uncertainty still more perplexing than when the discussion began. Five Judges, McLean, Wayne, Catron, McKinley and Grier, declared the laws null and void, and four judges, Taney, Daniel, Nelson and Woodbury were for sustaining them; but such was the diversity and conflict of views, even among the Judges concurring in the prevailing opinion, that the reporter frankly declares that "there was no opinion of the Court as a Court."<sup>1</sup>

Not the least interesting feature of these cases, is the extraordinary difference in recollection between Wayne and Taney as to what had passed in the consultation-room when *New York v. Miln* was decided, ten years before. Each, with the most perfect sincerity and fullness of detail, states what he recalls of the discussion and of the points determined; and each, with perfect courtesy, but with characteristic firmness,

<sup>1</sup> The discussion has been settled finally by the recent decisions of the Supreme Court, which have substantially sustained the doctrine that the regulation of foreign commerce is exclusively within the control of Congress, and that no State can attempt a regulation of commerce, even though there be no Act of Congress in existence with which such a regulation could conflict. *Wabash, St. Louis and Pacific R. R. Co. v. Illinois*, 118 U. S., 557 (1886); *Fargo v. Michigan*, 121 U. S., 230 (1886).

contradicts the other and labels the statement of his opponent as a dangerous error.

The relation of the States to the Union is still further exhibited in the following cases:

The protection of citizens in the enjoyment of religious liberty was held to be entirely a matter of State concern, as the Constitution of the United States had made no provision upon the subject.<sup>1</sup> The Court, therefore, had no jurisdiction. Nor had it jurisdiction over a question arising out of an alleged invalidity of a statute passed by the Territory of Michigan before she became fully organized as a State.<sup>2</sup> Nor is a State law providing punishment for the offense of circulating counterfeit coin of the United States unconstitutional or beyond the powers of a State, even though Congress may have provided a similar punishment. The prohibitions contained in the Amendments to the Constitution were intended to be restrictions upon the Federal Government and not upon the authority of the States.<sup>3</sup>

In several most interesting cases it was held as to the power of eminent domain that a bridge held by an incorporated company under a charter from a State might be condemned and taken as part of a public road under the laws of that State. Although the charter was a contract, yet like all private rights, it was subject to the power of eminent domain of the State, and the Constitution of the United States could not be so construed, as to deprive the State of such a power.<sup>4</sup>

In *Nesmith et al. v. Sheldon et al.*,<sup>5</sup> the Court swung

<sup>1</sup> *Permoli v. Municipality No. 1 of the City of New Orleans*, 3 Howard, 589 (1845).

<sup>2</sup> *Scott et al. v. Jones*, 5 Howard, 343 (1847).

<sup>3</sup> *Fox v. State of Ohio*, 5 Howard, 411 (1847).

<sup>4</sup> *West River Bridge Co. v. Dix et al. Id. v. Town of Brattleboro' et al.*, 6 Howard, 507 (1848).

<sup>5</sup> 7 Howard, 812 (1849).

back to the line from which it had departed in *Rowan v. Runnels*,<sup>1</sup> and declared that it was the established doctrine that the Supreme Court of the United States will adopt and follow the decisions of the State Courts in the construction of their own statutes where that construction has been settled by the decisions of their highest tribunal. And in *Nathan v. The State of Louisiana*,<sup>2</sup> they sustained the right of a State to tax its own citizens for the prosecution of any particular business or profession within the State; hence a tax imposed upon all money or exchange brokers was not void for repugnance to the Constitutional power of Congress to regulate commerce, even though foreign bills of exchange are instruments of commerce.

In *Luther v. Borden*,<sup>3</sup> a case arising out of the internal troubles and violence in the State of Rhode Island over the adoption of a Constitution in place of the Charter of Charles II—a period known in the annals of the State as “Dorr’s Rebellion,”—the Court, Mr. Justice Woodbury alone dissenting, declined to take jurisdiction of what was purely a political question lying beyond the reach of judicial authority. “How can this Court,” asked Webster, in argument, “invite the present Governor and the rebel to exchange places?”

“Much of the argument,” said the Chief Justice, “on the part of the plaintiff turned upon political rights and political questions, upon which the Court has been urged to express an opinion. We decline doing so. The high power has been conferred upon this Court of passing judgments upon the acts of the State sovereignties and of the legislative and executive branches of the Federal Government, and of determining whether they are beyond the limits of power marked out for them respectively by the Constitution of the United States. This tribunal, therefore, should be the last to overstep the boundaries which

<sup>1</sup> 5 Howard, 134 (1847).

<sup>2</sup> 8 Howard, 73 (1850).

<sup>3</sup> 7 Howard, 1 (1849).

limit its own jurisdiction; and while it should always be ready to meet any question confided to it by the Constitution, it is equally its duty not to pass beyond its appropriate sphere of action, and to take care not to involve itself in discussions which properly belong to other forums."

At this point we close our view of the first half of Taney's judicial career. It is a convenient stopping-place. It enables us to cast a glance backward and mark the general results accomplished by the untiring labors of the Court. No single decision strikes the eye equal in towering majesty to those of the days of Marshall. These still remained the unapproachable bulwarks of the nation's strength; but around and about them appeared many subsidiary works, built under the direction of keen and critical intelligence, extending, supporting and maintaining their effectiveness, while at times improving their construction by reducing undue prominences or unseemly projections. Within these, without crowding the former too closely, and without too many or too serious breaches for the purpose of room, line after line of ramparts had been thrown up around the rights of the States, within which they developed their mighty energies, nursed their resources and rounded out the full and harmonious figure of our dual system of government.

On the whole the work accomplished by Taney and his associates during the first fourteen years of his term, was quite as essential to the full realization of our welfare as a nation, and an accurate appreciation of the true character of our government as any preceding epoch in the history of the Court. It served to check excesses, to limit extravagances of doctrine, to awaken and develop new powers, to moderate tendencies, to introduce contrasts and elements which in future years could be mingled and used for the preservation of the whole, as well as for the protection of each part. The work of this period

was not compactly built, however, nor uniform in design. The mind of Taney never exercised the great or predominating influence over his associates which had been characteristic of Marshall. The practice of making the Chief Justice the organ of the Court in delivering opinions was abandoned, partly, as his associates have told us, because free from vanity himself, Taney was earnestly desirous of giving them all an opportunity of expressing their views, but chiefly, as any close student of the decisions cannot fail to perceive, because upon Constitutional questions the Court lacked cohesion. McLean and Wayne were the "high-toned Federalists" of the bench, as Mr. Justice Curtis called them when first taking his place as their associate. Catron, Grier and McKinley had similar tendencies, but far less pronounced, while Woodbury and Daniel, the former a man of original and striking powers of mind, though in the main in accord with the Chief Justice, broke from him upon the development of the admiralty jurisdiction. It was with Nelson that the Chief Justice most frequently concurred, and during the latter part of his career, the triumvirate which corresponded with that of Marshall, Washington and Story, was composed of Taney, Nelson and Campbell.

The Bar, during the period of which we have written, was marked by the presence of men of great professional strength. It is true that no single man exercised the potent sway over the Court or its decisions of which Pinkney or Webster could boast in the time of Marshall, but there was no departure from the general high standard of those days for learning, acuteness, thoroughness and precision, in the arguments of such exact and accomplished lawyers as Butler and Ogden, of New York, George Wood, of New Jersey, Berrien, of Georgia, and Binney and Sergeant, of Pennsylvania.

Pinkney's dazzling rhetoric was not much more highly colored than the burning eloquence of Choate; nor was the polished style of Wirt superior to the charm of the classic scholarship of Legaré, or the stately dignity of Seward. In the power to deal heavy blows Crittenden and Bibb, of Kentucky, might fairly vie with Chase and Stanton, of Ohio, while in the shining ranks of advocates whose union of legal learning, professional skill, logic and eloquence made them the most remarkable of all the men who appeared at that great Bar stood Reverdy Johnson, of Maryland, William M. Meredith and Jeremiah S. Black, of Pennsylvania, Caleb Cushing, of Massachusetts, and Charles O'Connor, of New York, who pressed forward to fill the gaps occasioned by the deaths of Clay, Webster and White.



## CHAPTER XVI.

FIFTH EPOCH: 1850-1861: THE LATTER HALF OF TANEY'S JUDICIAL CAREER: SKETCHES OF JUSTICES NELSON, WOODBURY, GRIER, CURTIS AND CAMPBELL: MISCELLANEOUS CASES: PATENTS: COPYRIGHTS: LAND GRANTS: CONTROVERSIES BETWEEN STATES AS TO BOUNDARIES: THE POWERS OF THE STATES: TAXING POWER: TO PASS RETROSPECTIVE LAWS: TO REVOKE FERRY GRANTS: TO PUNISH OFFENCES PUNISHABLE BY CONGRESS: TO PROTECT FISHERY RIGHTS: EXCEPTION TO POWER TO TAX: TO COLLECT TOLLS: LIABILITY OF CORPORATIONS TO TAXATION: JURISDICTION OF SUPREME COURT: COMMERCIAL LAW: CONTRACTS BY MAIL: MISCELLANEOUS CASES: EXTRADITION: THE WHEELING BRIDGE CASE: COOLEY *v.* BOARD OF WARDENS OF THE PORT OF PHILADELPHIA: GREAT EXTENSION OF THE ADMIRALTY JURISDICTION: THE GENESEE CHIEF: RISE OF THE SLAVE POWER: THE DRED SCOTT CASE: ABLEMAN *v.* BOOTH: TAYLOR *v.* CARRYL: SUITS AGAINST A STATE: HABEAS CORPUS CASES: GENERAL REVIEW OF WORK ACCOMPLISHED BY THE COURT PRIOR TO THE OUTBREAK OF THE CIVIL WAR.

WE now approach the most memorable part of the career of Chief Justice Taney, marked by the decision in *Dred Scott v. Sandford*, *Ableman v. Booth* and others which immediately preceded the outbreak of the Civil War. But before considering these cases, and others which led to them, it is proper to notice several changes which had taken place in the composition of the Bench.

Mr. Justice Thompson had died upon the 18th of December, 1843, and his place was filled by the appointment of Samuel Nelson, of New York, who was commissioned upon the 13th of February, 1845, and who remained in judicial harness until the latter part of 1872, when he retired under the provisions of the Act of April 10, 1869.

Samuel Nelson was born at Hebron, Washington County, New York, on the 10th of November, 1792, of Scotch-Irish

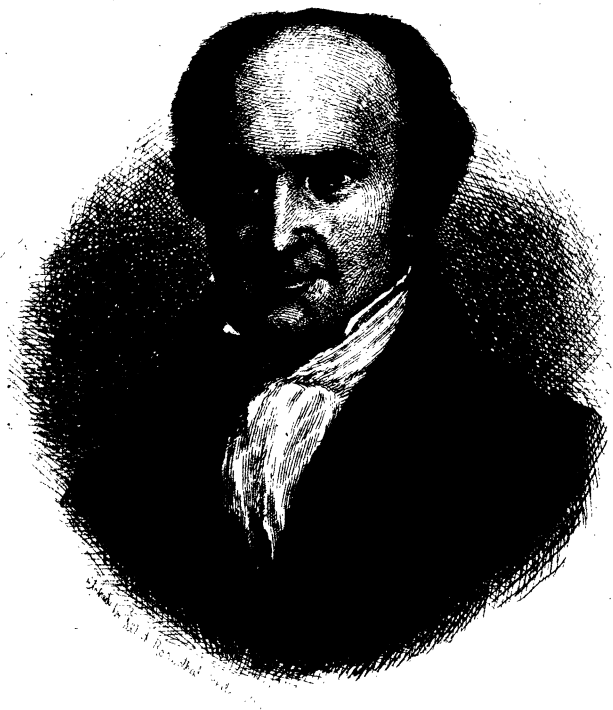
lineage, his ancestors having immigrated to this country in 1760. He was a graduate of Middlebury College, Vermont, in 1813, subsequently studied law under Chief Justice Savage, and, in 1817, was admitted to the Bar of Madison County, New York. In trying his first suit his discernment detected an error in practice on the part of an experienced opponent, and it was not long before he attracted attention by his skill in the trial of cases which won for him both reputation and clients. In 1820 he entered politics as a Presidential Elector, served as village postmaster, and two years afterwards was a delegate to the State Constitutional Convention, where he advocated the excision of a clause prescribing the property qualifications of voters. In 1823, at the age of thirty, he became one of the Judges in the Circuit Courts organized under the provisions of the Constitution which he had assisted in framing, William A. Duer and Reuben Walworth being among his Associates. After eight years' service upon this bench he became one of the Associate Justices of the Supreme Court of the State, in place of William L. Marcy, and, six years later, its Chief Justice, presiding in this capacity for eight years. In 1844, he was a member of a second State Constitutional Convention, and advocated changes in judicial tenure, warmly contending for the election of the judges by the people. In the following year he was appointed by President Tyler to succeed Mr. Justice Thompson upon the Supreme Bench of the United States, and held his place until his resignation, in December, 1872, at the age of eighty, his judicial career having covered nearly half a century—a service without a parallel in the history of jurisprudence. In 1871, he was appointed by President Grant a member of the Joint High Commission to arbitrate the Alabama Claims on the part of the United States, on account of



Samuel Nelson







*Levi Woodbury*

his proficiency in international law. A man of learning, sagacity, impartiality and integrity, acute, earnest and erudite, of kindly deportment towards the members of the Bar, of elevated conceptions of justice and right, and of particular knowledge and skill in the application of the law relating to patents, his judicial opinions constitute an impressive monument to his name.

Levi Woodbury, of New Hampshire, had the distinguished honor of succeeding to the place vacated by the death of Mr. Justice Story. He was commissioned in the recess, September 20, 1845, and re-commissioned, on confirmation, January 3, 1846. His term of judicial service was short, as he died in September, 1851. He is best known to the country for his services as a Senator of the United States, but his dissenting opinion in *Waring v. Clarke* is marked by such extraordinary and powerful reasoning, in which he denies that the admiralty jurisdiction extends within the body of a county even upon tide waters, that it is a matter of doubt whether his capacity as a jurist was not greater than a long life of public service had proved it to be as a statesman.

He was born in Francestown, New Hampshire, on the 22d of December, 1789, and claimed descent from English ancestors who had settled at Cape Ann four years after the Landing of the Pilgrims. He graduated with the highest honors of his class from Dartmouth College in 1809, and thereupon entered the Law School at Litchfield, Conn. He continued his legal studies in Boston, Exeter and Frances-town, and was admitted to the bar in 1812, meeting with great success. Chosen in 1816 to be Clerk of the State Senate, in the following year he was appointed Judge of the Supreme Court of the State. Two years later he removed to Portsmouth, where he continued to reside, and was elected

Governor in 1823, Speaker of the State House of Representatives in 1825, and was sent to Congress as a Senator of the United States, serving from 1825 to 1831. In politics he was an ardent Democrat, and at the end of his Senatorial term was appointed by President Jackson Secretary of the Navy, the duties of which office he discharged for three years, when he was transferred to the Treasury Department by President Van Buren, remaining in the Cabinet until the close of 1841. He was then again chosen a Senator of the United States, and served until 1845, when he was appointed by President Polk to be an Associate Justice of the Supreme Court of the United States, his nomination being confirmed without opposition. A short time previous to this appointment he had declined the position of Minister to England. His Alma Mater conferred upon him the degree of LL.D. in 1823, and he was a noted member of various literary societies. After his death a volume of his political, judicial, and literary writings was published in Boston which attests his attainments as a scholar. He was also known as the editor of a volume of law reports in connection with Judge Richardson, of New Hampshire. Thomas H. Benton termed him the "Rock of New England Democracy" for the part he took in the celebrated Senatorial debate relating to public lands. He also made himself conspicuous in the session of 1841 in defending the independent treasury system which was first established under his administration of that department, and in defeating the bank system of Henry Clay. He voted against the increase of the Navy, and in 1844 against the annexation of Texas. He enjoyed a succession of exalted public honors, but he thought much less of them than of the duties they entailed. Chief Justice Taney said of him: "He had been a member of the Court but a few years; yet he was long enough on the bench to leave behind him, in







*R. L. S.rien*

the reports of the decisions of the Court, the proofs of his great learning and industry, and of his eminent qualifications for the high office he filled."

Robert C. Grier, of Pennsylvania, was commissioned on the 4th of August, 1844, as an Associate Justice in the place of Henry Baldwin, deceased. He was not the original choice of President Tyler. The place was first offered to the celebrated John Sergeant, who declined it on the ground that being more than sixty years of age he had resolved to accept no public position, but with the suggestion that it be offered to Horace Binney, without informing him of his own declination or his reason. Mr. Binney declined it for the same reason, and suggested that the place be offered to Mr. Sergeant, with a similar injunction of secrecy as to his action. Mr. Grier was born on the 5th of March, 1794, on a farm in Cumberland County. His father was a clergyman, who gave him personal instruction until he was prepared to enter Dickinson College. For one year after graduation he taught in a grammar school attached to the College, but after that time went to Northumberland County to assist his father, who was a superior Greek and Latin scholar, whom he succeeded as principal of an academy in 1815, lecturing upon astronomy and chemistry, serving as professor of the classics and mathematics, and securing for his institution the library and philosophical apparatus of the celebrated Joseph Priestley. He then turned his attention to the law, under the direction of Charles Hall, an eminent practitioner of Sunbury; was admitted to the bar in 1817, and for nineteen years was engaged in active practice in Bloomsburg and Danville. Attaining professional distinction at an early age he was enabled to support his mother and educate ten brothers and sisters. At the age of forty-six years his reputation was so well established that he was made

President Judge of the District Court of Allegheny County, which caused his removal to Allegheny City. There he resided until 1848, after which time he made his home in Philadelphia during the rest of his life. Originally a Federalist, he acted with the Democratic Party until the outbreak of the civil war, when he attached himself ardently to the cause of the Union. He delivered the opinion of the Court in the Prize Cases, involving principles which were vital to the successful conduct of the war and the preservation of the integrity of the Union. Upon his resignation from the Supreme Court, in 1870, President Grant addressed to him a letter of regret, in which he expressed his appreciation of the great service which he was able to render to his country in the darkest hour of her history, by the vigor and patriotic firmness with which he "upheld the just powers of the government, and vindicated the right of the nation to maintain its own existence."

Possessed of sound judgment and great legal knowledge, he earned the good will and admiration of the entire profession. His learning was rich and varied, his comprehension of legal principles was clear, his power of close reasoning and forcible expression was striking, his character was marked by uprightness, simplicity and independence. He discharged his judicial duties with zeal and fidelity. His opinions contain no dicta, and form no essays; with very little quotation, they show, not the less, extensive learning and research. His spare references to authority were "the result of selection and not of penury." His personal life was pure and blameless, graced by modesty and refinement. As a lawyer, tested by professional standards, he occupies a front rank among the jurists of America. He had the singular experience of "attending," as Mr. Evarts said, "the funeral of his successor."





*D. N. Curtis*

He had resigned his place under the provisions of the Act of April 10th, 1869; his retirement to take effect on the 1st of February, 1870. The Hon. Edwin M. Stanton was appointed and duly commissioned upon the 20th of December, 1869, the commission to take effect the following February, but Mr. Stanton died four days afterwards, on the 24th of December, 1869.

Mr. Justice Woodbury died on the 4th of September, 1851, and Benjamin R. Curtis, of Massachusetts, was commissioned as his successor, during the recess, upon the 22d of September, 1851, and recommissioned, on confirmation, upon the 20th of December, of the same year. The appointment was made by President Fillmore at the earnest solicitation of Mr. Webster, then Secretary of State. Although holding his place for the brief period of six years, he established a judicial reputation second to none of his associates, and in conjunction with Mr. Justice Campbell, appointed a year later, brought to the bench an accession of judicial strength which rendered its opinions upon purely legal questions of the utmost value to the profession. Curtis was as deeply learned in the Common law and the principles of Chancery, as Campbell was in those of the Civil law and the Code of Louisiana. Born in widely sundered States, these men represented the opposite extremes of legal doctrine and professional training, and presented in contrast the most remarkable judicial qualities developed under diverse systems of education. Curtis was deeply imbued with the spirit of those sturdy statutes of Anglo-Saxon times which found their highest expression in Magna Charta and the Bill of Rights, and was in thorough sympathy with the doctrine of Lord Mansfield, announced in the case of the negro Somerset, that the soil of England was too free to be polluted by the footsteps of a slave. Campbell

was thoroughly inoculated with the principles of the great system of Roman law, which, however great its merits, was poisoned by the maxim that the will of the prince was the law of the subject. Both, in later life, after their resignation from the bench, attained to the most illustrious station as advocates at the bar.

Benjamin Robbins Curtis was born at Watertown, Massachusetts, on the 4th of November, 1809. He was of English descent, and his ancestors had emigrated in the ship "Lyon," and landed at Boston on the 16th of September, 1632. Upon his mother's side he was descended from Sarah Eliot, a sister of John Eliot, the "Apostle to the Indians." His grandfather was a physician, and his father a merchant who had made several voyages as supercargo, and afterwards as Master. His mother was Lois Robbins, of Watertown, a daughter of James Robbins, a prominent and respected citizen, who had carried on various branches of manufacturing, and had been interested in a country store. The future Associate Justice was their elder son, the younger being George Ticknor Curtis, the accomplished historian of the Constitution, the author of the Lives of Webster and of James Buchanan, and one of the counsel who argued the Dred Scott case in behalf of the slave. Benjamin was educated at Harvard College, having enjoyed early opportunities for reading under the direction of his mother. He won prizes, and took high rank as a scholar, displaying evident capacity for the legal profession. He entered the Law School at Cambridge, where he enjoyed the lectures of Mr. Justice Story, and finished his studies at Northfield under the direction of John Nevers, an old-fashioned lawyer, but not a man of distinction or remarkable ability.

His youth was passed in close and intimate friendship



with his uncle, George Ticknor, a celebrated man of letters. In 1832 he was admitted to the bar, and very early in the course of his professional career gave evidence of forensic powers of the highest order. His familiarity with the Common law, which he explored in the pages of Coke, the Year Books and the Law Reports, as well as the law relating to contracts and pleading, enabled him to win success. His acquaintance with equity practice did not begin until a later period, as the equity jurisdiction of the Courts of Massachusetts was at that time somewhat narrow and fragmentary. His studies in Constitutional law were profound. In a short time he removed from Northfield to Boston, as a more congenial field for the display of his talents. The extent and readiness of his attainments, his accuracy and logical methods soon made him prominent, and he greatly distinguished himself in the case of the slave child Med. It is somewhat singular that as counsel he contended in this case for exactly the opposite principle sustained by him so powerfully in his dissenting opinion in the Dred Scott case, maintaining that a citizen of a slave-holding State who comes to Massachusetts for the temporary purpose of business or pleasure and brings his slave as a personal attendant on his journey, may retain the slave for the purpose of carrying him out of Massachusetts and returning him to the domicile of the owner. At this time, however, the excitement upon the subject of slavery had not reached fever heat and the question could be discussed calmly without arousing an offended sense of morality by which slavery was to be regarded either as wicked in a court of law, or prohibited by the law of nations, or contrary to natural right. The decision, however, pronounced by Chief Justice Shaw, and concurred in by all the Judges, negatived the proposition maintained by Curtis, and held that the maxim

—the right of personal property follows the person of the owner—was to be limited strictly to those commodities that were everywhere and by all nations treated and deemed subjects of property; that the local laws which recognized property in slaves, while they might operate within their own jurisdiction so as to impart the incidents of property, could not operate *proprio vigore* outside of that jurisdiction; and that no rule of comity required a State to give to the laws of another State an operation within its territory which was inconsistent with its own public policy and legislation. His practice soon became extensive, both in the State and Federal courts, and he took some part, though not an active one, in public affairs, writing an article upon the “Repudiation of State Debts,” which was published in the *North American Review*. Upon the death of Judge Story Mr. Curtis was appointed to succeed him in the Corporation of Harvard College. Shortly after this the fugitive slave excitement broke out in Boston, and Mr. Curtis, although not a partisan, yet generally voting with the Whig Party, accepted the invitation to make an address of welcome to Mr. Webster, who had recently avowed his support and approval of a proposed Act of Congress,—one of the Compromise measures of 1850,—designed for the more effectual execution of the provision of the Constitution relating to the extradition of fugitive slaves.

The professional leadership of Mr. Curtis was so well established, that although the names of Judge Pitman, of the District Court of Rhode Island, and Judge Sprague of the District Court of Massachusetts, had been suggested to the President as suitable appointees, yet the appointment of Mr. Curtis gave universal satisfaction both to the Bar and the public. After ascending the bench, his first judicial utterance of importance was in *Cooley v. The Board of Port Wardens of the City of*

*Philadelphia*, in which he stated in new terms the doctrines of Constitutional law relating to the power of Congress to control foreign commerce and carried them to a greater height than had before been attained. The period of his judicial service was brief, and in popular recollection he will be chiefly remembered as the Judge who with Mr. Justice McLean most strongly dissented from the opinion of the majority of the Court in the Dred Scott case. His resignation from the Bench soon followed, taking place in 1857. The reasons which led to it were stated to be the insufficiency of his salary and his inability to support a large family upon his income; but the reader of the correspondence, which became somewhat embittered, between Chief Justice Taney and himself, in relation to an important change in the language and matter of the opinion of the Chief Justice, made after it had been delivered but before it had been filed, by which the Chief Justice inserted eighteen new pages in reply to the illustrations and objections urged by Judge Curtis in his dissenting opinion, will perceive the probable reason for his withdrawal from the Court.<sup>1</sup> He published two volumes of Reports of his decisions on Circuit, and a condensed edition of the decisions of the Supreme Court of the United States from its origin to 1854. He also delivered in 1872 to the students of the Harvard Law School a series of Lectures, which have been published under the title of "Jurisdiction, Practice and Peculiar Jurisprudence of the Courts of the United States." He was "the consummate master of forensic style among American lawyers of recent times. His clearness of thought and precision of statement were the delight not only of Bench and Bar, but even of

<sup>1</sup>The reader can follow this correspondence in the "Life and Writings of B. R. Curtis," edited by his son, Benjamin R. Curtis, Vol. I, pp. 212-230, and Tyler's "Memoir of Roger B. Taney," Chap. V, p. 331 *et seq.*

the educated laity who would be drawn into the court-room for the mere pleasure of listening to him as he unfolded an argument. There the most intricate problems of law through his treatment of them became lucid. . . . His rhetoric both in form and manner was perfection of its kind, for as he stood up and addressed the court,—clear, calm, distinct and unimpassioned,—he seemed to the listener the ideal of a forensic, dialectical orator.”<sup>1</sup>

The promotion of John Archibald Campbell to the bench was occasioned by the death of Mr. Justice McKinley in July, 1852. This great judge was commissioned upon the 22d of March, 1853. In less than eight years he also resigned. It will never cease to be a matter of professional regret that two such judges as Campbell and Curtis, having once attained such exalted stations, and having displayed such surpassing judicial powers, should have felt themselves called upon to retire from membership in a tribunal which they had greatly strengthened and adorned. In fact, had Campbell remained until the day of his death, his term of judicial service would have exceeded that of any man, Chief Justice or Associate, who had ever held a place upon that bench. It takes time to create a great judicial reputation, and the fruits of judicial wisdom ripen slowly. Had Marshall or Taney been stricken down in the midst of their careers, they would, as Chief Justices, be as little known to the country as Ellsworth and Chase. Or had Washington and Story resigned in middle life, their names would be as little remembered as those of Barbour and Woodbury. All of Chief Justice Marshall's great Constitutional judgments, save two, were pronounced after he had been fifteen years upon the bench,

<sup>1</sup>Life of Richard Henry Dana, by Charles Francis Adams, Vol. II, p. 139.



*J. A. Campbell*



and the remarkable impression which Story made was after his judicial harness had become well worn. It is a matter of satisfaction, however, to record that the influence of Curtis and Campbell upon the bench which they quitted was not lost, as in after years no men appeared at the bar whose arguments made a profounder impression.

John Archibald Campbell was born in Washington, Wilkes County, Georgia, upon the 24th of June, 1811. His father was Duncan Greene Campbell, a descendant of emigrants from Scotland to the Colony of North Carolina. His grandfather served in the Continental line, became a Captain, and was attached to the personal staff of General Nathaniel Greene. Duncan G. Campbell removed to Georgia, was admitted to the bar, and married Mary Williamson, the youngest daughter of Lieut. Col. Williamson, of the Georgia regiment commanded by Col. Elijah Clark, which became famous in the annals of the war in the Southern department. The brigade of Pickens, the regiment of Clark, with Lee's Legion and the commands of Sumter, Shelby, Sevier and Francis Marion have been aptly termed the Rear Guard of the Revolutionary Army. Duncan G. Campbell is described in the "Recollections of an Old Lawyer," one of his associates, as the leader of his party in the State, of captivating address, courtly manners, and an orator withal. The County Campbell and town Campbellton were named after him. He was an enlightened statesman in the State of Georgia. He died in 1828.

His son, John A. Campbell, was educated at the University of Georgia. He entered college at the age of eleven years, and graduated in 1826, at the age of fifteen, with the first honors of his class. He was appointed by John C. Calhoun, then Secretary of War, as a cadet in the Military

Academy at West Point. He was admitted to the bar in March, 1830, at Montgomery, Alabama, having pursued his legal studies under John Clark, one of the Governors of Georgia, and John W. Campbell, his uncle, and during that year married Miss Goldthwaite, from Boston. He was successful in the profession, and in 1837 removed to Mobile, where he resided till his appointment as Associate Justice of the Supreme Court of the United States in March, 1853. In 1836 there were disturbances among the Indian tribes in Alabama, and some devastations committed by them. The blame rested, principally, upon speculators in lands and intruders. Large bodies of troops were collected from Georgia and Alabama, and mustered into the service of the United States, forming two Corps d'Armée. John A. Campbell was appointed Adjutant General of the second army of the South, being at the same time a member of the Legislature.

The judicial services of Mr. Justice Campbell were terminated abruptly by his resignation in 1861. He was the only Judge swept from the bench of the Supreme Court by the tide of secession. Before leaving the Bench he was a volunteer agent for the Confederate Government, and engaged in futile conferences with Secretary Seward to obtain the withdrawal of the United States troops from Fort Sumter. After departing from Washington he declined office under the Confederacy until August, 1862, when he became Assistant Secretary of War, and passed several years in this uncongenial service. "When I saw this highly endowed and eminently disinterested and patriotic man," said Henry S. Foote, "for many long and dreary months patiently and quietly performing the duties of a subordinate position in the War Department, at Richmond, under the supervision of men who, compared with him, were mere pigmies in intellect, I could not help men-



tally recurring to the noted case of Epaminondas, in the olden time, who was insultingly sentenced to sweep the streets of Thebes as a meet reward for public services which all the wealth and honors in the gift of his stupid and inappreciative countrymen would have been able but poorly and inadequately to requite." When the financial collapse of the Confederacy was manifest, in 1864, Campbell with others was sent to Hampton Rhoads, where they met President Lincoln and Secretary Seward, and conferred on the restoration of peace, but effected no arrangement. On the capture of Richmond, in April, 1865, Campbell remained as the sole representative of the Confederacy.

When he resumed his place at the bar of the Supreme Court of the United States, his arguments became as renowned as any ever delivered before that tribunal. In the New Orleans Water Works case and in the suits brought by the States of New York and New Hampshire against the State of Louisiana, he impressed himself most profoundly on the Court, while in the Slaughter House Cases it is said: "He seemed to have levied a contribution on the literature and learning of the world to enable him to show the intolerance of the Common law of monopolies, and to furnish authentic examples of the almost infinite devices by which the strong have, in all countries and in all ages, managed to destroy or curtail the right of every individual to exercise his faculties in any way that might seem good in his own eyes, saving, of course, the rights of others, as a basis for his powerful contention that while African slavery, as it had existed in the Southern States, was the occasion for the provision of the Constitution putting an end to slavery or involuntary servitude, the language of the Constitution had a scope far beyond the occasion that caused its use,

and applied to all attempts to frustrate the Heaven-descended right of every man to exercise his faculties in his own way." He was a profound and philosophical jurist, who gave vigor and breadth to his intellect by constantly resorting to the great sources of Roman law.

With the Court thus constituted, a vast amount of business was transacted of the most varied and interesting character. One noticeable feature is the remarkable increase in the number of patent causes, some of them relating to inventions of world-wide celebrity: Woodworth's Planing machine, Stimpson's Railroad invention, Goodyear's India-rubber, Elias Howe's Sewing-machine, Tatham's method of making tubes from lead, Burden's patent for nails and spikes, Winans' coal cars with drop-bottoms, the McCormick Reaper, and greatest of all, Morse's Electro-magnetic Telegraph, which has done more to bind in the bonds of Federal union the most distant States than even steam-boats, railroads, and newspapers. These cases gave rise to the most intricate and perplexing problems, not only of law, but of mechanics and science. All were dealt with by both Bench and Bar in a manner which awakens the most enthusiastic admiration over the intellectual vigor displayed, by which inventive genius was protected in its just rights from mistaken claims as to priorities and from fraudulent infringements, while the rights of assignees were stated in terms which enforced the sacred obligations of trust.<sup>1</sup>

Closely allied with exclusive rights under patents was the

<sup>1</sup> *Stimpson et al. v. Wilson*, 4 Howard, 710 (1846). *Wilson v. Rousseau*, *Ibid.*, 647 (1846). *Wilson v. Simpson*, 9 Howard, 109 (1850). *Stimpson v. Baltimore and Susquehanna R. R. Co.*, 10 Howard, 329 (1850). *LeRoy et al. v. Tatham et al.*, 14 Howard, 156 (1852); 22 Howard, 132 (1859). *Troy Iron and Nail Factory v. Corning*, 14 Howard, 194 (1852). *O'Reilly v. Morse*, 15 Howard, 62 (1853). Opinion by Taney. *Corning v. Burden*, 15 Howard, 253 (1853). *Winans v. Denmead*, 15 Howard, 330 (1853). *Seymour v. McCormick*, 16 Howard, 480 (1853); 19 Howard, 96 (1856).

question of copyright, and although the Court declared that it would be difficult to assent to the proposition that an exclusive right either by Letters Patent or Copyright granted by the United States could be sold under the execution of a judgment of a State Court, yet they refused to pass directly upon the question; but they did hold that the right to print and publish a map which had been copyrighted did not pass to the purchaser at Sheriff's sale of the copper plate upon which it was printed.<sup>1</sup>

Another feature is the discussion of French and Spanish grants under the Treaty of Paris ceding the territory of Louisiana, Spanish titles under the Florida cession, and Mexican grants in California, and kindred subjects, by which, in suits of ejectment and actions of trespass, conflicting rights were settled in regard to the quiet and peaceable possession of territories as immense as the imperial domain of the Cæsars, and richer than the mines of Golconda.<sup>2</sup>

The boundaries between the States of Missouri and Iowa, and between Florida and Georgia were established.<sup>3</sup>

In the controversy between the latter States, in a case where a bill had been filed by the State of Florida against the State of Georgia to establish the boundary lines, the Attorney-General of the United States moved to intervene in behalf of the United States. It was held that he might do so, and adduce evidence both written and parol, examine witnesses,

<sup>1</sup>Stevens v. Gladding, 17 Howard, 447 (1854).

<sup>2</sup>United States v. Reynes, 9 Howard, 127 (1850). LaRoche et al. v. The Lessee of Jones et al., *Ibid.*, 155 (1850). United States v. Cities of Philadelphia and New Orleans, 11 Howard, 610 (1850). Montault v. United States, 12 Howard, 47 (1851). United States v. Hughes, 13 Howard, 1 (1851). United States v. Reading, 18 Howard, 1 (1855).

<sup>3</sup>State of Missouri v. Iowa, and Iowa v. Missouri, 7 Howard, 660 (1849); 10 Howard, 1 (1850). State of Florida v. State of Georgia, 17 Howard, 478 (1854).

and be heard upon argument, without making the United States a party in the technical sense of the term. His right to do so was sustained by a majority of the Court, speaking through the Chief Justice; but Justices Curtis, McLean, Campbell and Daniel strongly dissented. Chief Justice Taney in the course of his opinion said:

“The case then is this: Here is a suit between two States in relation to the true position of the boundary line which divides them, but there are twenty-nine other States, who are also interested in the adjustment of this boundary, whose interests are represented by the United States. Justice certainly requires that they should be heard before their rights are concluded by the judgment of the Court. For their interests may be different from those of either of the litigating States, and it would hardly become this tribunal, entrusted with jurisdiction where sovereignties are concerned, and with the power to prescribe its own mode of proceedings, to do injustice rather than depart from English precedents. A suit in a Court of justice between such parties, and upon such a question, is without example in the jurisprudence of any other country.”

Several important cases arose in which the powers of the States were considered. The taxing power of the States was upheld, the Court announcing that such a power, which was an attribute of sovereignty, should never be presumed to be relinquished unless the intention is declared in clear and unambiguous terms.<sup>1</sup> The right of the States to direct a re-hearing of cases decided in their own Courts was upheld. The only limit upon their power to pass retrospective laws, said the Court, is that which grows out of the prohibition by the Constitution of the United States of the passage of *ex post facto* laws, *i.e.*, retrospective penal laws; but laws merely divesting antecedent vested rights of property, where there was no contract, are not inconsistent with the Constitution of the

<sup>1</sup> Phila. and Wilmington R. R. Co. v. State of Maryland, 10 Howard, 376 (1850).

United States.<sup>1</sup> So too, a revocation by a State legislature of a grant of ferry rights to a town was upheld, the subject matter of the grant, and the character of the parties to it, both showing that such a grant was not a contract beyond legislative interference.<sup>2</sup> So, too, where the State of Illinois saw fit to provide a statutory punishment for the offence of harboring fugitive slaves, it was held that the State in the exercise of its police powers might repel from its borders an unacceptable population, paupers, criminals, fugitives or slaves, and to punish those of her citizens who endeavored to thwart this policy by assisting the fugitives, and it was no objection to this legislation that the offender might be liable to punishment under an act of Congress for the same offence.<sup>3</sup> From this judgment Mr. Justice McLean strongly dissented on the ground that it was contrary to the nature and genius of our government to punish an individual twice for the same offence, and where jurisdiction had been clearly vested in the Federal Government, and Congress had acted, no State could punish the same act.

And in *Smith v. The State of Maryland*,<sup>4</sup> it was held that a State law forbidding the taking of oysters with a scoop was Constitutional, and that a vessel with a license from the United States might be forfeited under such a law, inasmuch as the State had a right to preserve the public right of fishery. Mr. Justice Curtis, in delivering the opinion of the Court, declared that the purpose of the law was to protect the

<sup>1</sup> *Baltimore and Susquehanna R. R. Co. v. Nesbit et al.*, 10 Howard, 395 (1850).

<sup>2</sup> *Town of East Hartford v. Hartford Bridge Co.*, 10 Howard, 511 (1850).

<sup>3</sup> *Moore v. People of the State of Illinois*, 14 Howard, 13 (1852). This was in conformity with the decision in *Fox v. State of Ohio*, 5 Howard, 410 (1847).

<sup>4</sup> 18 Howard, 71 (1855). This was in confirmation of *Martin v. Waddell*, 16 Peters, 367 (1842), and *Den ex demise Russell v. The Jersey Company*, 15 Howard, 426 (1853).

growth of oysters in the waters of the State by prohibiting the use of particular instruments in dredging for them; that the soil below low-water mark was the subject of exclusive proprietary right and ownership, and belonged to the State on whose maritime border and within whose territory it lay, and that this soil was held by the State not only subject to, but in some sense in trust for, the enjoyment of certain public rights, among which was the common liberty of taking fish, as well shell-fish as floating fish.

But when a State imposed a tax upon passengers over the Cumberland Road, or a gross sum upon coaches carrying the United States mail, it was held to be a tax upon the United States, and in violation of the compact between the State and the United States.<sup>1</sup>

The extent and true meaning of grants to corporations were solemnly adjudicated, and attempts made by them to transcend their lawful powers were rebuked, all ambiguities in charters being resolved in favor of the public. An effort of a canal company, claiming under grants from three States, to collect tolls from passengers passing through the canals, or from vessels on account of the passengers on board, was restricted to tolls upon commodities.<sup>2</sup>

Corporations were subjected by taxation to their just share of the burdens of public expense.<sup>3</sup> And an effort to restrain one railroad company from crossing another at right angles was frustrated, and it was held that such crossing did not impair the obligation of the contract contained in the charter of the objecting company.<sup>4</sup>

<sup>1</sup>*Achison v. Huddleson*, 12 Howard, 293 (1851).

<sup>2</sup>*Perrine v. Chesapeake & Delaware Canal Co.*, 9 Howard, 172 (1850).

<sup>3</sup>*Philadelphia & Wilmington R. R. Co. v. State of Maryland*, 10 Howard, 376 (1850).

<sup>4</sup>*Richmond &c. Railroad Co. v. Louisa R. R. Co.*, 13 Howard, 71 (1851).

The scope and limits of Federal appellate jurisdiction were still more definitely settled, and litigants instructed in the oft-repeated lesson that where the decision of a State Court was in favor of the plaintiff's right claimed under an act of Congress, or where it was a State statute that had been construed, no writ of error would lie.<sup>1</sup> But the jurisdiction was upheld where a State Court had decided that a title acquired under a deed was better than one acquired under the judgment of a United States Court.<sup>2</sup> And although laws passed in Texas before her admission as a State could not be examined on a plea that they were in conflict with the Constitution of the United States,<sup>3</sup> the same point being ruled in *Kennett v. Chambers*,<sup>4</sup> yet where a Territorial Court had rendered judgment, and the record was certified to the Supreme Court of the United States *after* the admission of the Territory into the Union, the subject matter would and could be reviewed in the Supreme Court of the United States.<sup>5</sup>

The principles of commercial law were examined and applied in a multitude of instances, notably in cases of insurance and of promissory notes, and it was held that where the contract grew out of a correspondence, the deposit of a letter in the mail accepting the terms of an offer completed the contract.<sup>6</sup>

A number of cases of a miscellaneous character were considered, which show the range and variety of subjects discussed. The far-famed rule in *Shelly's* case was considered

<sup>1</sup> *Trustees of the Bank of Cincinnati v. Baldwin*, 9 Howard, 261 (1850).

<sup>2</sup> *Clements v. Berry*, 11 Howard, 398 (1850).

<sup>3</sup> *League v. De Young*, 11 Howard, 185 (1850).

<sup>4</sup> 14 Howard, 38 (1852).

<sup>5</sup> *Webster v. Reid*, 11 Howard, 437 (1850).

<sup>6</sup> *Tayloe v. Merchants' Insurance Co. of Baltimore*, 9 Howard, 390 (1850).

in *Webster v. Cooper*.<sup>1</sup> The liability of a Railroad Company for negligence in injuring a stockholder, while riding free at the President's invitation, was enforced.<sup>2</sup> The City of Providence was held liable for a breach of municipal duty in not maintaining her sidewalks safe from snow;<sup>3</sup> while General Kosciusko's wills were interpreted in *Ennis et al. v. Smith*.<sup>4</sup> Duties upon imports and the proper interpretation of the Acts of Congress relating thereto, were considered in a case which involved the appraisement of the amount of quinine contained in Peruvian bark.<sup>5</sup>

In discussing the question of the citizenship of corporations, in the case of *Marshall v. The Baltimore & Ohio Railroad Co.*,<sup>6</sup> the Court upheld sound principles of morality by avoiding contracts to obtain legislation through the employment of secret agents, who were to be paid if successful, on the ground that such contracts were against public policy.

In administering the principles of general equity jurisprudence, which it was insisted must be uniform throughout the United States, it was held that the decisions of State courts, when not depending upon local law or usage, were not binding upon the United States Courts.<sup>7</sup>

In *re Thomas Kaine*,<sup>8</sup> an alleged fugitive from Great Britain, a question of extradition, arising under the tenth article of the Treaty of 1842 between the United States and Great Britain, was considered. A warrant had been issued by

<sup>1</sup> 14 Howard, 488 (1852).

<sup>2</sup> *Philadelphia & Reading Railroad Co. v. Derby*, 14 Howard, 468 (1852).

<sup>3</sup> *City of Providence v. Clapp*, 17 Howard, 161 (1854).

<sup>4</sup> 14 Howard, 400 (1852).

<sup>5</sup> *Bartlett v. Kane*, 16 Howard, 263 (1853). *U. S. v. Sixty-seven Packages of Dry Goods*, 17 Howard, 85 (1854). *U. S. v. Nine Cases of Silk Hats*, *Ibid.*, 97 (1854).

<sup>6</sup> 16 Howard, 314 (1853).

<sup>7</sup> *Neves et al. v. Scott et al.*, 13 Howard, 268 (1851).

<sup>8</sup> 14 Howard, 103 (1852).



a United States Commissioner at the instance of the British Consul for the apprehension of a person, who it was alleged had committed an assault with attempt to murder in Ireland. Kaine having been committed for the purpose of abiding the order of the President of the United States, applied for a *habeas corpus*, which was issued by the Circuit Court of the United States, and after a hearing, the writ was dismissed, and the prisoner remanded to custody. The opinion of the Court refusing the motion for the writ was delivered by Mr. Justice Catron, in which Justices McLean, Wayne and Grier concurred. Justice Curtis delivered a separate opinion, which was dissented from by the Chief Justice, and Justices Daniel and Nelson, all of whom believed that the writ should issue in order to bring up the prisoner with a view to his discharge, on the ground that the judiciary possessed no jurisdiction to entertain the proceedings under the treaty, without a previous requisition made under the authority of the English Crown upon the President: and on the further ground that the United States Commissioner was not an officer within the terms of the Treaty upon whom the power had been conferred to hear and determine the question of criminality upon which the surrender was made.

The greatest and most prominent of all the discussions at this period, however, were those which turned upon the meaning of the "Commerce Clause" in the Constitution, and two cases arose which are among the most celebrated in the annals of our jurisprudence: *The Wheeling Bridge* case and the case of *Cooley v. The Board of Wardens of the Port of Philadelphia*.

The former came before the Court upon several occasions,<sup>1</sup>

<sup>1</sup> *State of Pennsylvania v. The Wheeling & Belmont Bridge Co. et al.*, 9 Howard, 647 (1850); 13 Howard, 518 (1851); 18 Howard, 421 (1855).

and was argued by Mr. Edwin M. Stanton, in behalf of the State of Pennsylvania, and Mr. Reverdy Johnson, in behalf of the Bridge Company, with a degree of ability and learning worthy of the palmiest days of the old Bar of the Supreme Court. In fact, the argument of Mr. Stanton touched the profoundest depths of the question, and rose to the loftiest heights of eloquence. It was contended that the Ohio River was a highway of commerce leading to and from the ports of Pennsylvania, regulated by Congress, which had been unlawfully obstructed by the bridge across the river at the city of Wheeling, built under the authority of the State of Virginia, without a draw, to the injury of the State of Pennsylvania, and that, therefore, the bridge ought to be abated as a nuisance by decree of the Court in the exercise of its original jurisdiction, a State being party plaintiff. The opinion was delivered by Mr. Justice McLean, sustaining this contention, and putting the Bridge Company upon terms either to elevate its structure, build a draw, or to remove it entirely. From this judgment Chief Justice Taney dissented, together with Mr. Justice Daniel, upon the ground that it was doubtful whether the bridge was a public nuisance, or whether the Court had jurisdiction to decree its abatement. Before the decree of the Court could be executed, an Act of Congress was passed, by which the bridge constructed by the company was declared to be a lawful structure in its then condition, and was also declared to be a post-road for the passage of the mail of the United States. Subsequently the main bridge was blown down in a gale of wind, and the Company was making preparations to rebuild it when a bill was filed, praying for an injunction. It was held that Congress, under its power to regulate commerce, might supersede the decree of the Supreme Court founded upon public right, and that such

an act was not in conflict with the Consitution. Although Congress could not annul a judgment of the Court upon the private rights of the parties, it could annul one founded on the unlawful interference with the enjoyment of a public right, that being entirely under the control of the national legislature. The opinion of the Court upon the latter application was delivered by Mr. Justice Nelson, concurred in by Justices Wayne, Grier and Curtis, Mr. Justice McLean dissenting. Mr. Justice Daniel, while concurring in the decision of the Court, dissented from the reasons expressed.

In the case of *Cooley v. The Board of Wardens of the Port of Philadelphia*,<sup>1</sup> a law of the State of Pennsylvania for the regulation of pilots and pilotage was held to be Constitutional, Judge Curtis declaring that the terms of the act, which provided that a vessel neglecting or refusing to take a pilot shall forfeit and pay to the Master Wardens of the Pilots for the Society for the Relief of Distressed and Decayed Pilots, constituted an appropriate part of a general system of regulations on the subject of pilotage, and did not conflict with the Article of the Constitution prohibiting States from imposing imposts and duties on imports, exports and tonnage, inasmuch as these subjects were distinct from fees and charges for pilotage and from the penalties by which commercial States enforced their pilot laws. In considering whether the law in question was repugnant to the clause vesting in Congress the power to regulate commerce, he said:

“That the power to regulate commerce includes the regulation of navigation we consider settled. And when we look to the nature of the service performed by pilots, to the relations which that service and its compensation bear to navigation between the several States, and between the ports of the United States and foreign countries, we are brought to

<sup>1</sup> 12 Howard, 299 (1851).

the conclusion that the regulation of the qualifications of pilots, of the modes and times of offering and rendering their services, of the responsibilities which shall rest upon them, of the powers they shall possess, of the compensation they may demand, and of the penalties by which their rights and duties may be enforced, do constitute regulations of navigation, and consequently of commerce, within the just meaning of this clause of the Constitution. . . . How, then, can we say that by the mere grant of power to regulate commerce the States are deprived of all the power to legislate on this subject, because, from the nature of the power, the legislation of Congress must be exclusive? This would be to affirm that the nature of the power is, in any case, something different from the nature of the subject to which in such case the power extends, and that the nature of the power necessarily demands in all cases exclusive legislation by Congress, while the nature of one of the subjects of that power not only does not require such exclusive legislation, but may be best provided for by many different systems enacted by the States in conformity with the circumstances of the ports within their limits. . . . It is the opinion of a majority of the Court that the mere grant to Congress of the power to regulate commerce did not deprive the States of power to regulate pilots, and that although Congress has legislated on this subject, its legislation manifests an intention, with a single exception, not to regulate this subject, but to leave its regulation to the several States.”

From this reasoning Justices McLean and Wayne dissented, and Mr. Justice Daniel, although concurring in the judgment of the Court, dissented from its reasoning.

After considering the rules governing navigation upon the river Ohio, in certain cases of collision and jettison,<sup>1</sup> the Court made a lasting contribution to the jurisprudence of the country in the extension of the national admiralty and maritime jurisdiction, in the case of the *Propeller Genesee Chief et al. v. Fitzhugh et al.*<sup>2</sup>

<sup>1</sup> *Williamson et al. v. Barrett*, 13 Howard, 101 (1851). *Lawrence v. Minturn*, 17 Howard, 100 (1854).

<sup>2</sup> 12 Howard, 443 (1851).

An Act of Congress passed on the 26th of February, 1845, had extended the jurisdiction of the District Courts to certain cases upon the Great Lakes and navigable waters connecting the same, and it was held in a memorable opinion by Chief Justice Taney that this act was Constitutional.

"These lakes," said he, "are in truth inland seas. Different States border on them on one side, and a foreign nation on the other. A great and growing commerce is carried on upon them between different States and a foreign nation which is subject to all the incidents and hazards that attend commerce on the ocean. Hostile fleets have encountered on them, and prizes been made, and every reason which existed for the grant of admiralty jurisdiction to the General Government on the Atlantic Seas applies with equal force to the lakes. There is equal necessity for an instance and for a prize power of the Admiralty Court to administer international law, and if the one cannot be established, neither can the other. . . . The only objection made to this jurisdiction is that there is no tide in the lakes or the waters connecting them; and it is said that the admiralty and maritime jurisdiction, as known and understood in England and in this country at the time the Constitution was adopted, was confined to the ebb and flow of the tide. Now there is certainly nothing in the ebb and flow of the tide that makes the waters peculiarly suitable for admiralty jurisdiction, or anything in the absence of a tide that renders it unfit. If it is a public navigable water on which commerce is carried on between different States and nations, the reason for the jurisdiction is precisely the same. And if a distinction is made on that account, it is merely arbitrary, without any foundation in reason; and, indeed, would seem to be inconsistent with it."

From this judgment Mr. Justice Daniel dissented, as he had always done upon every notable extension of the admiralty jurisdiction, and in an opinion delivered by Mr. Justice Wayne in *Fretz et al. v. Bull et al.*,<sup>1</sup> it was held in expansion of the doctrine of *Waring v. Clarke*,<sup>2</sup> that the admiralty

<sup>1</sup> 12 Howard, 466 (1851).

<sup>2</sup> 5 Howard, 441 (1847).

jurisdiction of the United States extended to collisions on the Mississippi River above tide-waters. From this decision Mr. Justice Daniel again dissented.

It was from the consideration of questions such as these that the Court glided at a single turn to the brink of a fearful precipice. No monitory shuddering warned them of impending ruin. The broad current of decision and of argument flowed on as usual, unbroken by hidden obstructions or whirling eddies, as smooth as the glassy surface of a descending stream upon the very edge of its fall. In a moment they became involved. The wild passions of the Kansas-Nebraska struggle had reached the Court. The agony of conflict between slavery and freedom, which touched the tongue of Phillips with fire and raised the soul of Sumner to the stars, had wrapped them in its frenzy, and in a moment of bewilderment they believed that they had the judicial power to deal with a political and moral question, and by a judgment, which they vainly endeavored to induce the country to believe was not extra-judicial, to settle the most agitated question of the day. The judgment was pronounced, but was promptly reversed by the dread tribunal of War.

At the December Term, in the year 1856, the case of Dred Scott, Plaintiff in error, *v.* John F. A. Sandford stood for a second argument, on two questions stated by an order of the Court to be argued at the bar. The first question was whether Congress had Constitutional authority to exclude slavery from the Territories of the United States, or in other words whether the Missouri Compromise Act, which excluded slavery from the whole of the Louisiana Territory, north of the parallel 36° 30' was a Constitutionally valid law. The second question was whether a free negro of African descent, whose ancestors were imported into this country and sold as

slaves, could be a citizen of the United States, under the Judiciary Act, and as a citizen could sue in the Circuit Court of the United States.<sup>1</sup>

The action had been brought by Scott in the Circuit Court of the United States for the District of Missouri, to establish the freedom of himself, his wife and their two children. In order to give the Court jurisdiction of the case, he described himself as a citizen of the State of Missouri, and the defendant, who was the administrator of his reputed master, as a citizen of the State of New York. A plea to the jurisdiction was filed, alleging that the plaintiff was not a citizen of Missouri, because he was a negro of African descent, whose ancestors were of pure African blood, and were brought into this country and sold as slaves. To this plea there was a general demurrer, which was sustained by the Court and the defendant was ordered to answer over. A plea to the merits was then entered, to the effect that the plaintiff and his wife and children were negro slaves, the property of the defendant. The case went to trial, and the jury, under an instruction from the Court upon the facts of the case that the law was with the defendant, found a verdict against the plaintiff, upon which judgment was entered, and the case was then brought upon exceptions by writ of error to the Supreme Court of the United States.

It is clear that the first question raised by the record arose under the plea to the jurisdiction of the Circuit Court, and after a careful study of the opinions and dissenting opinions, it is equally clear that if it had been decided by the Supreme Court that Scott was not a citizen by reason of his

<sup>1</sup>In stating these questions, I have followed the language of Mr. George Ticknor Curtis, one of the counsel who argued the case, whose full and accurate knowledge of the inside history of the case exceeds that of any other man living.

African descent, the only thing that could be properly done would be to direct the Circuit Court to dismiss the case for want of jurisdiction, without looking to the question raised by the plea to the merits. But if the Court should decide that he was a citizen notwithstanding his African descent, then the question raised by the plea to the merits relating to his personal status as affected by his residence in a free territory and his return to Missouri would have to be acted upon. This latter question involved the Constitutional power of Congress to prohibit slavery in that part of the Louisiana territory purchased by the United States from France, and also the collateral question as to the effect to be given to a residence in the free State of Illinois, and a subsequent return to Missouri. Upon an action brought in the State Court many years prior, the Supreme Court of Missouri had held Scott to be still a slave, upon the broad ground that no law of any other State or Territory could operate in Missouri upon personal status, even if he did become an inhabitant of such other State or Territory.

The case was first argued before the Supreme Court of the United States at the December Term of 1855, and it was found, after consideration and comparison of views, that it was not necessary to decide the question of Scott's citizenship under the plea to the jurisdiction, but that the case should be disposed of by an examination of the merits. Mr. Justice Nelson was assigned to write the opinion of the Court upon this view of the case, from which, however, Justices McLean and Curtis dissented. The opinion prepared by Nelson, judging from its internal evidence, as well as the history of it given by him,<sup>1</sup> was designed to be delivered as the opinion of

<sup>1</sup> See letter of Mr. Justice Nelson to Mr. Tyler, in Tyler's "Memoir of Taney," Chap. V, p. 385.



the majority of the Bench, and in disposing of the plea to the jurisdiction, he said: "In the view which we have taken of the case, it will not be necessary to pass upon this question, and we shall, therefore, proceed at once to an examination of the case upon its merits. The question upon the merits, in general terms, is whether or not the removal of the plaintiff, who was a slave, with his master from the State of Missouri to the State of Illinois with a view to a temporary residence, and after such residence and return to the slave State, such residence in the free State works emancipation." The opinion then disposed of the case upon the ground that the highest Court in the State of Missouri had decided that the original condition of Scott had not changed and that this was a question of the law of Missouri, on which the Supreme Court of the United States should follow the law as it had been laid down by the highest tribunal of the State. The conclusion reached by the opinion was not that the case should be dismissed for want of jurisdiction, but that the judgment of the Circuit Court which had held Scott to be still a slave should be affirmed. Shortly after this, however, a motion was made by Mr. Justice Wayne, in a conference of the Court, for a re-argument of the case, and the two questions, which we have stated at the outset of our discussion of the matter, were carefully framed by the Chief Justice to be argued at the bar *de novo*. The cause was argued by Montgomery Blair and George Ticknor Curtis, in behalf of the plaintiff in error, and Reverdy Johnson and Senator Geyer, of Missouri, for the slave-owner.

At the second argument Mr. Justice Wayne became fully convinced that it was practicable for the Supreme Court of the United States to quiet all agitation on the question of slavery in the Territories by affirming that Congress had

no Constitutional power to prohibit its introduction, and, unfortunately for himself, his associates, and the country, persuaded the Chief Justice, and Justices Grier and Catron of the public expediency of this course. The opinion of the Court was then pronounced by Chief Justice Taney,<sup>1</sup> in which Mr. Justice Wayne absolutely concurred. Mr. Justice Nelson read his own opinion, which had been previously prepared as that of the Court. Mr. Justice Grier concurred in Nelson's opinion, and was of opinion also that the Act of 6th March, 1820, known as the "Missouri Compromise," was unconstitutional and void, as stated by the Chief Justice. Justices Daniel and Campbell concurred generally with the Chief Justice, while Mr. Justice Catron thought that the judgment upon the plea in abatement was not open to examination in this Court, and concurred generally with the Chief Justice upon the other points involved. Justices McLean and Curtis alone dissented, the former stating that the judgment given by the Circuit Court on the plea in abatement was final. He was also of opinion that a free negro was a citizen, and that the Constitution justified the Act of Congress in prohibiting slavery, and further that the judgment of the Supreme Court of Missouri pronouncing Scott to be a slave was illegal, and of no authority in the Federal Court.

Without entering into technical niceties, it is perhaps sufficient to say that the general judgment of the profession, entirely irrespective of the political questions involved, is to the effect that the Court after holding, upon consideration of the plea in abatement, that Dred Scott was not a citizen of the United States, and that therefore the Circuit Court had no jurisdiction, ought to have dismissed the case, without

<sup>1</sup>The exact date, March 6th, 1857, is perhaps noteworthy, being just two days after the inauguration of James Buchanan as President.

entering upon the consideration of the second question involved, and that in doing so they transcended the proper bounds of judicial authority, and indulged in mere *obiter dicta* of no legal validity or conclusiveness. Although an elaborate effort was made by Mr. Reverdy Johnson, in a letter written to a public meeting in Baltimore, in relation to the manner of Chief Justice Taney in handling the case, to justify the action of the majority of the Court, yet it is clear that Mr. Johnson's argument vanishes into thin air, as soon as it is remembered that every word written and read by Justices McLean and Curtis was written and read as their dissent from the opinion of the Chief Justice, which they had heard read in conference, and in which the doctrine was elaborately maintained that Congress had no Constitutional power to exclude slavery from any Territory of the United States. The propriety with which any member of the Bench could touch this question—the test of whether his views were judicial or extra-judicial—depended simply and solely upon his view that the Circuit Court had or did not have jurisdiction on the facts averred in the plea to the jurisdiction.<sup>1</sup>

No portion of Chief Justice Taney's opinion is more labored or constrained than the effort to show that, after disposing of the plea in abatement, which, when sustained as it had been upon demurrer, ousted the jurisdiction of the Court, the Court had still a right to enter upon a discussion of the merits of the case.<sup>2</sup> And no part of the dissenting opinion of Mr. Justice Curtis is more powerful, from a legal point of view, than his consideration of the doctrines of pleading involved, and fairly arising out of the state of the record.<sup>3</sup>

<sup>1</sup> George Ticknor Curtis, "Memoir of Benj. Robbins Curtis," Vol. I, p. 238.

<sup>2</sup> See opinion of Chief Justice Taney in *Dred Scott v. Sandford*, 19 Howard, 393 (1856).

<sup>3</sup> See dissenting opinion of Mr. Justice Curtis, *Ibid.*, 564.

The Chief Justice used the following language, after having shown historically that at the time of the adoption of the Constitution of the United States free negroes were not citizens: "They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race either in social or political relations; and so far inferior that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race."

The injustice which has been done to Chief Justice Taney consists in the partisan use which was made of the single phrase, "That they had no rights which the white man was bound to respect." The words were violently torn from the context of the opinion, and quoted as though the Chief Justice had intended to express his own individual views upon the question, naturally arousing a storm of indignation at their inhumanity and barbarity. That such were not the personal views of the Chief Justice, no careful or conscientious student of his life can for a moment suppose. He had long before manumitted all his own slaves, had never refused his professional aid to negroes seeking the rights of freedom; had even defended a person indicted for inciting slaves to insurrection, at a time when the community were violently excited against the offender and against Taney himself for his defense, and, when pressed with the gravest business, had been known to stop in the streets of Washington to help a negro child home with a pail of water. He was moreover a man of the greatest kindness, charity and sympathy. The real wrong-

doing of which the Chief Justice was guilty was in attempting by extra-judicial utterances to enter upon the settlement of questions purely political, which were beyond the pale of judicial authority, and which no prudent judge would have undertaken to discuss. It was a blunder worse than a crime, from the consequences of which he and his associates can never escape.

So far as his historical illustrations were concerned, they were fully met by the dissenting opinion of Mr. Justice Curtis, who showed by decisions of the Supreme Court of North Carolina that free colored persons born within the State were citizens of that State, and by logic, were therefore, citizens of the United States. It was all idle, as an eminent lawyer and statesman has observed, himself of the same political faith as the Chief Justice,<sup>1</sup> to argue that in the earliest English days there were slaves who had no rights; that if a stranger slew one, his lord recovered the damage, or if his master killed him, he was but a chattel the less; that serfs were goods, and that the Judges of the time of Charles II had united in declaring negroes to be merchandise liable to forfeiture, and that years after our independence they were treated in British statutes as merchandise, with rum and iron, and that slavery existed and had been recognized by the laws of every State when the Constitution was formed. There was a higher law between the parties, and no general agreement could prevail against natural right. Nor was it possible to believe that when the Fathers of the Republic said all men were free and equal, they meant only white men, and even if they did, they had no power to bind their descendants forever to a doctrine so unjust. And this view is concurred

<sup>1</sup> See Annual Address by Clarkson N. Potter before the American Bar Association, 1881, "Fourth Annual Report of Amer. Bar Assn.," p. 196.

in by a gentleman of the highest professional distinction, himself a lifelong member of the party of Chief Justice Taney, in a recent exhaustive study of the decisions of the Chief Justice, in which he states that although the opinion displays great ingenuity and knowledge of the political history of the country, yet it seems to him that the Chief Justice, in an anxious endeavor to carry out the views so often expressed by him as to the right of the individual States to deal exclusively with the subject of this domestic relation, had been carried far beyond the proper limitations within which it should have been confined.<sup>1</sup> Dr. Von Holst pronounces the decision a political enormity, based upon the fact that the decision went beyond the record, and that the Chief Justice and the concurring Associates indulged in the most palpable sophisms upon the extent of their appellate jurisdiction, confounding the method of procedure upon writs of error from the judgments of State Courts, with that which ought to prevail when the judgment of a United States Circuit Court was brought up, and it appeared in the record that the lower court had no jurisdiction.<sup>2</sup>

It is not necessary to consider the political aspect of the case, nor to answer, as has been elaborately done, the assault made by Mr. Seward in the Senate of the United States upon the Supreme Court, in which he distinctly hinted that a corrupt political bargain had been made between the Chief Justice and President Buchanan at the time of his inauguration. Nor is it necessary to consider whether authoritative proof

<sup>1</sup> See "Constitutional Development in the United States as Influenced by Chief Justice Taney," by Geo. W. Biddle, Esq., of Philada., published in "Constitutional History of the United States as seen in the Development of American Law."

<sup>2</sup> Von Holst's "Constitutional and Political History of the United States from 1856 to 1859," Vol. V, p. 23-46.

can be produced in support of Mr. Ashley's contention, which has been adopted by Dr. Von Holst, that a systematic effort had been made by the slave-holders to secure a preponderating position of influence in the Supreme Court of the United States in order to secure the judgment. The high character of the Justices, and the length of time that they had held their offices would refute any such statement. Although bitter partisans might assume that some such deep laid plot had been successfully carried out, yet no one who temperately and calmly considers the facts as developed from the decisions of the Supreme Court itself, and the correspondence of the day, can arrive at such a conclusion, although he cannot fail to lament that in yielding to a fatal delusion Mr. Justice Wayne, in a moment of infatuation, became convinced that the Court could settle political and moral questions for all time, and that too on the wrong side, and thus did more to undermine the influence of this great tribunal, and prostrate the personal influence of its members, as well as blacken their record, than can be predicated of any other cause to be found in the length and breadth of our judicial history.<sup>1</sup>

In less than two years after the decision in the Dred Scott case had been pronounced the State of Wisconsin arrayed herself in an attitude of defiance to a solemn judgment of the Supreme Court of the United States, and Chief Justice Taney must have recalled the similar experience of Chief Justice Marshall, when his judgment in the Cherokee case had been scoffed at by the State of Georgia. An effort had

<sup>1</sup> Mr. Bryce, in his work on "The American Commonwealth," Vol. I, ch. 24, speaks of the Dred Scott case, which, in a moment of weakness, induced the Court to overstep the legitimate bounds of its authority, as one of the misfortunes to be ranked with the interposition of the Court in the Presidential Electoral count dispute of 1877, and the reversal of its earlier decisions upon the legality of legal tender notes.

been made to enforce the provisions of the Fugitive Slave Law, and the Supreme Court of Wisconsin pronounced the Act unconstitutional and void, and resisted to the utmost its administration and enforcement by the Federal authorities. The question arose in the case of *Ableman v. Booth*.<sup>1</sup> In delivering the opinion of the Court, the case being argued by Attorney-General Jeremiah S. Black, for the plaintiffs in error, but no counsel appearing upon the other side, Chief Justice Taney declared that it appeared that a Judge of the Supreme Court of Wisconsin had claimed and exercised the right to supervise and annul the proceedings of a Commissioner of the United States, and to discharge a prisoner who had been committed for an offence against the laws of the Federal Government, and that this exercise of power had been afterwards sanctioned and affirmed by the Supreme Court of the State; that the State Court had gone even farther, and claimed and exercised jurisdiction over the proceedings and judgment of a District Court of the United States, and upon a summary and collateral proceeding of *habeas corpus*, had set aside and annulled its judgment, and discharged a prisoner who had been tried and found guilty of an offence against the laws of the United States, and sentenced to imprisonment; and that it further appeared that the State Court had not only claimed and exercised this jurisdiction, but had also decided that their decision was final and conclusive upon all the Courts of the United States, and had ordered their clerk to disregard and refuse obedience to the writ of error issued by the Supreme Court pursuant to the Act of Congress of 1789, to bring up for examination and revision the judgment of a State Court. He said:

<sup>1</sup> 21 Howard, 506 (1858).



"These propositions are new in the jurisprudence of the United States, as well as of the States; and the supremacy of the State Courts over the Courts of the United States in cases arising under the Constitution and laws of the United States is now, for the first time, asserted and acted upon in the Supreme Court of a State. . . . It would seem to be hardly necessary to do more than to state the result to which this decision of the State Court must inevitably lead. It is of itself a sufficient and conclusive answer; for no one will suppose that a Government which has now lasted nearly seventy years, enforcing its laws by its own tribunals, and preserving the Union of the States, could have lasted a single year, or fulfilled the high trust committed to it, if offenses against its laws could not have been punished without the consent of the State in which the culprit was found."

He then proceeds, by a course of unanswerable logic, to demonstrate that such a claim would result in the most disastrous consequences, and that it would lead, if persisted in, to a complete destruction of the harmony and peace of the Union. After pointing out that it was evident, under our system, that the Constitution, as the fundamental and supreme law, had vested in the Supreme Court the power of final settlement of all such questions, he reasons thus with the State authorities:

"Nor is there anything in this supremacy of the General Government or the jurisdiction of its judicial tribunals to awaken the jealousy or offend the natural and just pride of State sovereignty. Neither this government, nor the powers of which we are speaking, were forced upon the States. The Constitution of the United States, with all the powers conferred by it on the General Government, and surrendered by the States, was the voluntary act of the people of the several States, deliberately done for their own protection and safety against injustice from one another; and their anxiety to preserve it in full force in all its powers, and to guard against resistance to, or evasion of its authority on the part of a State, is proved by the clause which requires that the members of the State Legislatures, and all Executive and Judicial officers of

the several States (as well as those of the General Government), shall be bound by oath or affirmation to support this Constitution. . . . Now it certainly can be no humiliation to a citizen of a Republic to yield a ready obedience to the laws as administered by the constituted authorities. On the contrary, it is among his first and highest duties as a citizen, because free government cannot exist without it; nor can it be inconsistent with the dignity of a sovereign State to observe faithfully, and in the spirit of sincerity and truth, the compact into which it voluntarily entered when it became a State of this Union. On the contrary, the highest honor of sovereignty is untarnished faith, and certainly no faith could be more deliberately and solemnly pledged than that which every State has plighted to the other States, to support the Constitution as it is, in all its provisions, until they shall be altered in the manner which the Constitution itself prescribes."

The judgment of the Supreme Court of Wisconsin was, therefore, reversed.

But few other cases of importance occurred before the actual outbreak of the Civil War. In the case of the *Commonwealth of Kentucky v. Dennison*,<sup>1</sup> the Chief Justice maintained the following propositions: That in a suit between two States, the Supreme Court had original jurisdiction without further Acts of Congress regulating the mode in which it shall be exercised, and that suit by or against the Governor of a State in his official capacity is a suit by or against the State. This was in conflict with the doctrine so elaborately expressed and argued for the first time with so much ability by Mr. Justice Iredell in his dissenting opinion in the famous case of *Chisholm's Exrs. v. The State of Georgia*,<sup>2</sup> but with an appreciation of the difficulty that might exist in enforcing a decree entered against a recalcitrant State, the Chief Justice, in tones which have been referred to as pathetic, declared that if the Governor refused to discharge his duty there was no power dele-

<sup>1</sup> 24 Howard, 66 (1860).

<sup>2</sup> 2 Dallas, 419 (1793)

gated to the General Government, either through the judicial department or any other department, to use any coercive means to compel him.

Truly it seemed as if the Chief Justice, at the end of his long career, had entered a cloud, and found his authority contested at every turn; for in the famous Merryman case,<sup>1</sup> which involved the right of the President or his delegate to suspend the writ of *habeas corpus*, he found himself unable to enforce his authority, where a citizen of Baltimore had been arrested by a military force acting under the orders of a Major General of the United States Army, commanding in the State of Pennsylvania, and had been committed to the custody of the General commanding Fort McHenry, then a part of the military district of Maryland. Upon an application for a writ of *habeas corpus*, the Chief Justice, sitting at chambers, directed the commandant at the Fort to produce the body of the petitioner upon the next day. This was promptly declined, on the ground that the prisoner had been arrested upon a charge of treason, and was "publicly associated with, and holding a commission as Lieutenant in a company, having in their possession arms belonging to the United States, and avowing his purpose of armed hostility against the Government, and also because the officer having the petitioner in custody was duly authorized by the President of the United States in such cases to suspend the writ of *habeas corpus* for the public safety." The Chief Justice in a most elaborate opinion upon the law relating to the writ of *habeas corpus* held these reasons to be insufficient, and that the petitioner was entitled to be set at liberty. He found himself unable, however, to enforce his decree.<sup>2</sup>

<sup>1</sup> 1 Campbell, 246 (1868).

<sup>2</sup> This case led to a most earnest controversy among eminent jurists all over the country in relation to the power of the President to suspend the writ of

In reviewing the decisions delivered by the Supreme Court during the Chief Justiceship of Mr. Taney, it is clear that the doctrines announced by the Court are characterized by a much closer adherence to the language of the Constitution than had been common in the days of Marshall, and that as a whole the authority of the States had been extended and supported, upon numerous occasions, in a manner which qualified, if it did not restrict, the principles announced by the great Chief Justice. The theories of the Constitution entertained by Marshall and Taney were those of their respective parties, and are irreconcilable. Without imputing to either a desire to extend unnecessarily or immoderately the doctrines of their schools, it can be safely asserted that although partisan politics should have no place upon the Bench, yet it is impossible to expect men to divest themselves of certain fundamental views in relation to the nature of our government simply because they have ascended the Bench and thrown aside the contentions of the political arena.<sup>1</sup> In later years a general recurrence to the doctrines of Marshall became unavoidable, and the tendency has been steadily in the direction of the proper logical development of his principles, which have proved themselves to be the safeguards of national institutions and the life of national authority. At the same time a debt of gratitude is due to those

*habeas corpus*, the affirmative being sustained by such eminent jurists as Horace Binney, of Philadelphia, Benjamin R. Curtis, of Boston, and Chief Justice Parker, of Massachusetts; while the contrary was maintained by a host of less distinguished writers, whose pamphlets constitute an interesting chapter in Constitutional law. The action of the President was sustained by public opinion arising out of the extreme peril of the situation, and the fact that armed treason had taken the field against the Federal authorities.

<sup>1</sup>An interesting paper, entitled "Partisanship in the Supreme Court," is to be found in the *North American Review*, Vol. CXXXII, 176, written by United States Senator John T. Morgan.

Judges who refused to prostrate the rights of the States, and to carry to violent extremes, doctrines which, if pressed beyond their proper and legitimate sphere, would result in absolute centralization and the destruction of the autonomy of the States.

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NOTE.

The following interesting facts, showing the increase of the business of the Court, are stated by Mr. Justice Strong:

In 1801, when John Marshall was appointed Chief Justice of that Court, the number of cases brought into it for adjudication was only ten. The entire number during the five next following years, including both writs of error and appeals, was only one hundred and twenty, or an average of twenty-four for each year. Thenceforward the business of the Court increased slowly, until, in the period between 1826 and 1830, the aggregate number of cases brought into it was two hundred and eighty-nine—the average being about fifty-eight a year. In 1836, when Roger B. Taney succeeded Marshall as Chief Justice, the number was only thirty-seven. From 1830 to 1850, the increase was also very gradual. Within the five years ending with 1850, the number of cases brought into the Court, including those docketed and dismissed without argument, was three hundred and fifty-seven, or an average of seventy-one each year. The Court was then able to dispose of its entire docket during a session of three months. But, since the year 1850, the increase has been much more rapid. Within the five years ending with 1880, the number of new cases has been nineteen hundred and fifty-three, averaging more than three hundred and ninety-one each year. This exhibits, certainly, a very remarkable increase, serious in its consequences.—“The Needs of the Supreme Court,” *North American Review* for May, 1881, Vol. CXXXII, 437.

## CHAPTER XVII.

SIXTH EPOCH: 1861 to 1870: OUTBREAK OF THE CIVIL WAR: CHARACTER OF CASES BEFORE THE COURT: CALIFORNIA LAND CLAIMS: MEXICAN, SPANISH AND FRENCH TITLES: THE PRIZE CASES: RIGHTS AND LIABILITIES OF NEUTRALS AND BELLIGERENTS: A NATIONAL CRISIS: VALUE OF THE PRINCIPLES ESTABLISHED BY MARSHALL AS SHOWN IN THE TAX CASES: DEATH OF TANEY: APPOINTMENT OF SALMON P. CHASE AS HIS SUCCESSOR: SKETCHES OF CHIEF JUSTICE CHASE AND OF ASSOCIATE JUSTICES CLIFFORD, SWAYNE, MILLER, DAVIS AND FIELD: CASES GROWING OUT OF A CONDITION OF WAR: THE JURISDICTION OF MILITARY COMMISSIONS: QUESTIONS OF PRIZE: BLOCKADE: MRS. ALEXANDER'S COTTON: THE ATLANTA: EFFORTS TO RESTRAIN THE ENFORCEMENT OF THE RECONSTRUCTION ACTS: EX PARTE MILLIGAN: TEXAS *v.* WHITE: CASES GROWING OUT OF THE REBELLION: THE CONFISCATION ACT: CAPTURED AND ABANDONED PROPERTY ACT: EFFECT OF PRESIDENTIAL PARDON: RIGHTS OF OFFICERS AND SOLDIERS OF THE ARMY OF THE UNITED STATES: CALIFORNIA LAND TITLES: THE OBLIGATION OF CONTRACTS: THE RIGHT OF THE FEDERAL JUDICIARY TO DISREGARD STATE DECISIONS ON QUESTIONS OF COMMERCIAL LAW: PATENTS: POLICE POWERS OF THE STATES: THE COMMERCE CLAUSE: CRANDALL *v.* STATE OF NEVADA: STATE FREIGHT TAX: GILMAN *v.* CITY OF PHILADELPHIA: MISCELLANEOUS CASES.

AT the commencement of December Term, 1861, there were three vacancies upon the Bench of the Supreme Court, occasioned by the deaths of Justices Daniel and McLean, and by the resignation of Mr. Justice Campbell, who had espoused the cause of Secession. Chief Justice Taney, and Justices Clifford and Catron were absent, the first on account of age and infirmities, the last, also an aged man, on account of illness. The work was done by less than a majority. Mr. Justice Wayne, the senior associate, who had taken his seat upon the bench before the death of Marshall, presided, assisted by Justices Nelson, Grier and Swayne, the latter being appointed after the beginning of the term.

At the opening of the proceedings Mr. Edward Bates, Attorney-General of the United States, declared that the Court had held no sadder term since its organization. "Your lawful jurisdiction," said he, "is practically restrained. Your just power is diminished, and into a large portion of our country your writ does not run; and your beneficent authority to administer justice according to law is for the present successfully denied and resisted. The country presents a ghastly spectacle. A great nation lately united, prosperous and happy, and buoyant with hopes of future glory, is torn into warring fragments, and the land, once beautiful and rich in the flowers and fruits of peaceful culture, is stained with blood and blackened with fire. In all that wide space from the Potomac to the Rio Grande, and from the Atlantic to the Missouri, the still, small voice of legal justice is drowned by the incessant roll of the drum and the deafening thunder of artillery. To that extent your just and lawful power is practically annulled, for the laws are silent amidst arms."

Although war was actually raging no traces of its ravages can be found in the Reports. The serene atmosphere of the Court had not yet been disturbed. But few barristers had donned the uniform of the soldier, and the Bench had not yet been invited to consider questions of prize. The Judges still sat to discuss matters of account, patents, admiralty, agency, practice, land claims and trusts, and in the case of the *Jefferson Branch Bank v. Skelly*,<sup>1</sup> exercised the highest of their prerogatives, in determining that the decision of a State Court upon a matter of contract made by a State with the incorporators was not conclusive of the question if

<sup>1</sup> 1 Black, 436 (1861).

the action of the State, sustained by her own tribunals, impaired the validity of that contract.

In the case of *The Ohio and Mississippi Rail Road Company v. Wheeler*,<sup>1</sup> Chief Justice Taney, in affirmation of the line of reasoning pursued in several former cases,<sup>2</sup> held that where a corporation is created by the laws of a State the legal presumption is that its members are citizens of the State in which alone it has a corporate existence, and a suit by or against it in its corporate name must be presumed to be a suit by or against citizens of the State which created it, and no averment to the contrary would be tolerated in support of an effort to withdraw the suit from the jurisdiction of the Federal Courts.

Land claims of immense magnitude, involving nice questions, arising under Mexican and Spanish laws in force in the State of California, and claims arising under French and Spanish laws under the Louisiana Treaty, taxed the energy of both bench and bar.<sup>3</sup> These cases were argued in the most exhaustive manner, and were discussed at great length upon the bench.

But in 1862 the *Prize Cases* arose, in which the rights and liabilities of neutrals as to blockade, and violations of blockade, the President's right to institute a blockade, and what constituted sufficient evidence of a Presidential proclamation, were discussed at great length, and conclusions were reached which have become incorporated into the great body of International Law.<sup>4</sup>

<sup>1</sup> 1 Black, 286 (1861).

<sup>2</sup> *Louisville, Cincinnati and Charleston R. R. Co. v. Letson*, 2 Howard, 497 (1844). *Marshall v. The Baltimore and Ohio R. R. Co.*, 16 Howard, 314 (1853). *Covington Drawbridge Co. v. Shepherd et al.*, 20 Howard, 227 (1857).

<sup>3</sup> *United States v. Andres Castillero*, 2 Black, 18 (1862).

<sup>4</sup> *The Prize Cases*, 2 Black, 635, (1862).



The importance of these decisions cannot be over-estimated. There are crises in jurisprudence as well as in war. The fate of our nation hung no less upon the determinations of the Supreme Court, than upon the gathering of armies and the fitting out of fleets. The proclamations of President Lincoln of April 19th and 27th, 1861, the blockade of the Southern ports, and the capture on the high seas of ships carrying contraband goods, or of ships owned by citizens residing in the rebellious States raised the vital questions, Was there a war? Could there be prize? The real peril of the situation is best described by Mr. Richard H. Dana, Jr., one of the counsel for the Government, in a letter written upon the 9th of March, 1863. He said:

"The Government is carrying on a war. It is exerting all the powers of war. Yet the claimants of the captured vessels not only seek to save their vessels by denying that they are liable to capture, but deny the right of the Government to exercise war powers,—deny that this can be, in point of law, a war. So the Judiciary is actually, after a war of twenty-three months' duration, to decide whether the Government has the legal capacity to exert these war powers. . . . Contemplate, my dear sir, the possibility of the Supreme Court deciding that this blockade is illegal! What a position it would put us in before the world, whose commerce we have been illegally prohibiting, whom we have unlawfully subjected to a cotton famine, and domestic dangers and distress for two years! It would end the war, and where it would leave us with neutral powers, it is fearful to contemplate! Yet such an event is legally possible,—I do not think it probable, hardly possible, in fact. But last year I think there was danger of such a result when the blockade was new, and before the three new Judges were appointed."<sup>1</sup>

<sup>1</sup> Charles Francis Adams, "Life of Richard Henry Dana," Vol. II, p. 267.

The three new judges referred to were Swayne, Miller and Davis, all appointed by President Lincoln in 1862. As Mr. Adams points out before they took their seats, the Supreme Court was composed of Chief Justice Taney, and the five Associate Justices, Wayne, Catron, Nelson, Grier, and Clifford, all Democrats, and

The cases were argued by Mr. Dana, Mr. Evarts and Attorney-General Bates, for the United States, and by Messrs. Carlisle, Lord, Edwards and Bangs for the claimants, in a manner worthy of the issue and of the tribunal.

The opinion of the Court was delivered by Mr. Justice Grier:

"This greatest of civil wars," said he, "was not gradually developed by popular commotion, tumultuous assemblies, or local unorganized insurrections. However long may have been its previous conception, it nevertheless sprung forth suddenly from the parent brain, a Minerva in the full panoply of war. The President was bound to meet it in the shape it presented itself without waiting for Congress to baptize it with a name, and no name given to it by him or them could change the fact. It is not the less a civil war, with belligerent parties in hostile array, because it may be called an 'insurrection' by one side, and the insurgents be considered as rebels or traitors. . . . As soon as the news of the attack on Fort Sumter and the organization of a government by the seceding States, assuming to act as belligerents, could become known in Europe, to wit: on the 13th of May, 1861, the Queen of England issued her proclamation of neutrality, 'recognizing hostilities as existing between the Government of the United States of America and certain States, styling themselves the Confederate States of America.' This was immediately followed by similar declarations, or silent acquiescence by other nations. After such an official recognition by the sovereign, a citizen of a foreign State is estopped to deny the existence of a war, with all its consequences as regards neutrals. They cannot ask a Court to affect technical ignorance of the existence of a war which all the world acknowledges to be the greatest civil war known in the history of the human race, and thus cripple the arm of the Government and paralyze

three of them appointed from slave-holding States. What made the situation more grave was the fact that the Chief Justice had already from his Circuit bench in the Merryman case challenged the legality of that most important act of President Lincoln, the suspension of the Habeas Corpus Act. A graphic statement of the crisis in public affairs is given in a letter of Mr. Thornton K. Lothrop written to Mr. Adams. "Life of Dana," by C. F. Adams Vol. II, Appendix, p. 395.

its power by subtle definitions and ingenious sophisms. The law of nations is also called the law of nature; it is founded on the common consent, as well as the common sense of the world. It contains no such anomalous doctrine as that which this Court is now for the first time desired to pronounce, to wit: that insurgents who have risen in rebellion against their sovereign, expelled her courts, established a revolutionary government, organized armies and commenced hostilities, are not enemies because they are traitors; and a war levied on the Government by traitors in order to dismember and destroy it, is not a war, because it is an insurrection."

Having determined, therefore, that the President had a right *jure belli*, to institute a blockade of ports in the possession of the States in rebellion, which neutrals were bound to regard, Mr. Justice Grier went on to show that the term "enemy" was properly applicable to all persons residing within enemy territory whose property might be used to increase the revenues of the hostile power, though not foreigners. "They have cast off their allegiance," said he, "and made war on their government, and are none the less enemies because they are traitors."

In the case of a vessel owned by foreigners he held that the cargo, having been shipped after notice of the blockade, should follow the fate of the vessel, and in each and every case the judgment of condemnation in the court below was affirmed.

From these doctrines Mr. Justice Nelson dissented in a very elaborate opinion. His conclusions were that no civil war existed between the Federal government and the States in insurrection, until recognized by the Act of Congress of 13th of July, 1861, and that the President did not possess the power, under the Constitution, to declare war, or recognize its existence within the meaning of the law of nations, which carried with it belligerent rights, and thus change the

condition of the country and all its citizens from a state of peace into a state of war. He contended that the decrees of condemnation ought to be reversed, and the vessels and cargoes restored. In one of the cases Chief Justice Taney and Justices Catron and Clifford united with him in dissent.

At the same critical hour the inestimable value of the principles established by Chief Justice Marshall was shown, in an opinion delivered by Mr. Justice Nelson, in the case of *The People of the State of New York v. Commissioners of Taxes*,<sup>1</sup> in which it was held that that portion of the capital of a New York Bank which had been invested in stocks, bonds or other securities of the United States, was not liable to taxation by the State. A tax on the loans of the Federal Government is a restriction, said the Court, upon the Constitutional power of the United States to borrow money, and if a State had such a right, being in its nature unlimited, it might be so used as to defeat the Federal power altogether.

Chief Justice Taney was so much indisposed as to be

<sup>1</sup> 2 Black, 620 (1862). The same conclusion was reached in the Bank tax case, 2 Wallace, 200 (1864), where it was held that a State tax on the capital of a State bank is a tax on the property of the institution, and when it consists of the stocks of the United States such tax is invalid. See also *Van Allen v. Assessors*, 3 Wallace, 573 (1865) in which a distinction was drawn between a tax on the capital of the bank and a tax upon shares held in a bank, which were held to be a distinct and independent interest or property held by the shareholder, and that Congress had legislated in such a manner as to leave the shares of the stockholders subject to State tax. United States bonds were not liable to taxation under State legislation. *The Banks v. The Mayor*, 7 Wallace, 16 (1868). United States notes issued under the Acts of 1862 and 1863 were not liable to State taxation. *Bank v. Supervisors*, *Ibid.* 26 (1868). A tax imposed by Congress on bank circulation is Constitutional, *Veazie Bank v. Fenno*, 8 Wallace, 533 (1869). In all these cases the opinion was delivered by Chief Justice Chase. In *First National Bank v. Commonwealth of Kentucky*, 9 Wallace, 353 (1869), it was held in an opinion by Mr. Justice Miller that though the capital of a bank, invested in Federal securities, could not be taxed by a State, yet the shareholders might be taxed on their shares. See also *R. R. Co. v. Peniston*, 18 Wallace, 5 (1873); *The Delaware Railroad Tax Case* *Ibid.* 206, (1873).





*H. P. P.*

unable to sit during 1863, and died in October, 1864. Salmon P. Chase was commissioned as his successor upon the 6th of December, of that year. At this time Mr. Chase was in the fifty-sixth year of his age, but his iron frame and robust constitution gave promise of a long career. It was not so ordained. In eight years he succumbed to the effects of superhuman labor and the exhaustion of the vital forces which had followed the years of sleepless anxiety attending his exertions as Secretary of the Treasury during the greater part of President Lincoln's administration. In point of natural ability he was the equal of any of his predecessors, and their superior in a commanding and majestic personal presence, which was in harmony with his great intellectual powers. Fifteen years of absence from the bar, during which he had devoted himself almost exclusively to the political questions of the day, had done much to obscure his fame as a lawyer, and to dull his law learning by disuse; but he seated himself with ease and grace in the chair of justice, and exhibited from the outset faculties entirely adequate to the able and satisfactory discharge of his high duties. "The ability of his judgments," said Mr. Reverdy Johnson, "the full knowledge which they displayed, and the admirable judicial style in which they were rendered, filled the professional mind not only with admiration, but with wonder." Almost all of the opinions of the Supreme Court involving questions of international law or of prize growing out of the Civil War, were written by him, and display not only his thorough familiarity with controlling principles, but his extraordinary skill in applying them to new and perplexing conditions. They are remarkable examples of clearness and force.

He was born in Cornish, New Hampshire, on the 13th of January, 1808. The blood of the English Puritan and of

the Scotch Covenanter mingled in his veins, and the sturdy, resolute and independent traits of his ancestry were fully displayed at every stage of his varied career. He was descended in the ninth generation from Thomas Chase, of Chesham, England, and in the sixth from Aquila Chase, who came to Newbury, Massachusetts, in 1640.

He was the eighth of the eleven children of Ithamar Chase, and his wife, Jeanette Ralston, a woman of Scotch descent. Of his father's seven brothers, three were lawyers and graduates of Dartmouth College, one a Senator of the United States from Vermont, two were physicians, one a Bishop of the Episcopal Church, and one a farmer. His earliest teacher was Daniel Breck, afterwards a well-known jurist of Kentucky. At school he was attentive, "full of faith, not much given to ask the cause of things," as he himself tells us, but ready to accept what was told him. An amusing incident is recorded of his effort to set the river Ashuelot on fire. He had lost his shoe in a pool, and knowing that water could be dried up by heat, built a fire upon an extemporized raft, and set it afloat, but soon abandoned the attempt. He lost his father at an early age, but was cared for by his uncle, the Bishop, then residing in Ohio, until he was fifteen years old. He then returned to the family home at Keene, and in 1824 entered Dartmouth College, from which he graduated two years later. He then taught school in Washington, D. C., while studying law with William Wirt. At this period he devoted part of his leisure time to light literature, and addressed a poem to the daughters of his preceptor. In 1829 he was admitted to the bar of Washington, but removed to Cincinnati, then the Queen of the West, where he soon acquired an important practice. He prepared an edition of the Statutes of Ohio, which for completeness and thoroughness



has never been surpassed, and which was warmly commended by Chancellor Kent and Mr. Justice Story.

His views in opposition to slavery became pronounced, and were confirmed by witnessing the destruction of the office of James G. Birney's "Philanthropist" by a pro-slavery mob. "Freedom of the press and Constitutional liberty," he solemnly declared, "must live or perish together." A few months later, in 1837, he became counsel for Matilda, an alleged fugitive slave, who had been brought from Virginia by her master to Cincinnati, *en route* to Missouri. Mr. Chase argued, upon an application for a writ of *habeas corpus*, that when a slave-owner voluntarily brought his slave into a free State, the slave by that act became free, and could in no sense be termed a fugitive, or be reclaimed under the Fugitive Slave Law of 1793. He was unsuccessful; but his argument made a profound impression. Mr. Birney was then indicted under a State law for harboring the fugitive, and was convicted and fined. In the appeal to the Supreme Court of Ohio Chase purposely omitted to call attention to the fact that the indictment contained no averment that the defendant knew the person harbored to be a slave, preferring to renew his former contention; for if Matilda were not a slave, Mr. Birney could not be guilty of harboring her as a fugitive. The Court reversed the judgment upon the technical point, and declined to pass upon the main question, but directed the argument of Mr. Chase to be published. His efforts in behalf of freedom were so constant and continuous that he became known in Kentucky as "Attorney General for runaway negroes."

In 1841 he became one of the founders of a Liberty Party. In 1846, with Mr. Seward as a colleague, he argued before the Supreme Court of the United States the case of

John Van Zandt,<sup>1</sup> who had aided in the escape of slaves, as it was charged, although the evidence went to show that, without knowing who they were, he had met them in the road, and taken them some distance in his wagon. He contended that actual notice of the fact of escape was necessary under the Act of 1793; that the Act itself was inconsistent with the Ordinance of 1787 for the government of the Territory Northwest of the Ohio, and was repugnant to the Constitution of the United States. On all of these points he was unsuccessful. In 1850 he was sent to the Senate of the United States through the coalition of the Free-Soilers with the Old-Line Democrats. Here he took part in memorable debates with Clay, Webster, Cass and Douglas. He earnestly opposed the proposal of Jefferson Davis that there should be non-intervention with slavery in the Territories, and spoke against the Compromise measures, which included the Fugitive Slave Law of 1850. He refused to support Pierce for the Presidency, and persistently assailed the Repeal of the Missouri Compromise. He also advocated economy in national finances, a Pacific Railroad, the Homestead Law and cheap postage. In 1855 Mr. Chase became the Republican candidate for Governor of Ohio, and was elected, and afterwards re-elected. He was a supporter of John C. Fremont for the Presidency in 1856, and in 1860 himself received forty-nine votes in the nominating convention. Upon the third ballot Mr. Lincoln was chosen through the support of Mr. Chase's friends. He was again sent to the Senate of the United States, but upon the day after taking his seat was appointed by President Lincoln Secretary of the Treasury. Summoned at a moment of alarming danger and perplexity, he devoted the energies of a comprehen-

<sup>1</sup> 5 Howard, 215 (1847).

sive and creative mind to the administration of the national finances, when immediate decision was indispensable, and delay or debate would have been fatal. The systems of the past were inadequate to the enormous and unexpected strain put upon them. He had to devise new ones, and he seized, wielded and shaped the available wealth of the nation in support of military and naval movements vaster than any known to history. The promptness and vigor with which his strong, sagacious and practical intellect invented and executed measures amid the rapid whirl of swiftly succeeding events, and the untiring and unselfish devotion to duty, which failed to exhaust his magnificent energies, will command the admiration of centuries. As a financier, he stands beside Robert Morris and Alexander Hamilton.

A somewhat persistent lack of harmony in feeling and opinion between the President and the Secretary as to the appointment of a subordinate officer induced Mr. Chase to resign his portfolio, yet shortly afterwards President Lincoln testified the highest regard for his abilities by appointing him Chief Justice of the United States. In the words of Mr. Justice Clifford, "From the first moment he drew the judicial robes around him he viewed all questions submitted to him as a judge in the calm atmosphere of the Bench, and with the deliberate consideration of one who feels that he is determining issues for the remote and unknown future of a great people."

Mr. Evarts has pointed out that his mental and moral constitution fitted him most conspicuously for judicial service; and, after stating that the Bar had neither unkindly nor unnaturally doubted whether the Chief Justice were competent to handle the diversified subjects and the manifold complexities which were involved in the cases before him, asserts that in all the transcendent functions of the tribunal, the pre-

paration and the adequacy of the Chief Justice were unquestioned.

Mr. Chase presided over the Impeachment of President Johnson before the Senate, and discharged the duties of that novel and exalted position in a spirit of judicial impartiality. Although his conduct was a disappointment to many bitter partisans, who visited upon him the most indiscriminating censure, yet "the charge against him," said Mr. Evarts, "if it had any shape or substance, came only to this: that he brought into the Senate, in his judicial robes, no concealed weapons of party warfare, and that he did not wrest from the Bible, on which he took and administered the judicial oath, the commandment for its observance."

The most notable cases in which he delivered the opinion of the Court will be noticed in the following pages; but it is proper to dwell upon the extraordinary self-possession and calmness of judgment which induced him, after the most serious reflection, to decide that some measures which he had devised as Secretary of the Treasury for the salvation of the country, were unconstitutional when brought to the final test of the law. His action in this particular has led to animadversion; but, as Mr. Justice Clifford has said, "Men find it easy to review others, but much more difficult to criticise and review their own acts, and yet it is the very summit to which the upright judge should always be striving. Judges sometimes surrender with reluctance a favorite opinion, even when condemnation confronts it at every turn, and they find it well nigh impossible to yield it at all when it happens to harmonize with the popular voice, or is gilded with the rays of successful experiment. . . . Judges and jurists may dissent from his final conclusion and hold, as a majority of the justices of this Court do, that he was right as Secretary of the Treasury, but





Albert R. ...

Cratman Cliffora

every generous mind, it seems to me, should honor the candor and self-control which inspired and induced such action."

In the year 1870 he was stricken with paralysis and from that time until his death, upon the 7th of May, 1873, was an invalid.

The senior associate at this time was Nathan Clifford, who was born at Rumney, Grafton County, New Hampshire, upon the 18th of August, 1803. His ancestors had immigrated in 1644, and settled at Hampton. They were farmers, and shared all the hardships and privations common to the pioneers of civilization in the New England States. The records show that many members of the family became conspicuous in the military service during the Colonial wars and the Revolution. The great-grandfather of the Judge was Treasurer and Collector of the town of Rumney, and by his courage and enterprise contributed not a little to the success of that settlement. His father was a man who enjoyed the respect and esteem of the community, of serious and impressive deportment, somewhat stern, but possessed of a high degree of intelligence. His mother was a woman of unusual energy and strength of character, of great vigor and clearness of mind. She lived to a great age, and witnessed the success of her son in attaining the highest honor of his life. Nathan was the only son. He received the rudiments of education in the common schools of his native town, but he was an ambitious boy, and after becoming a pupil in Haverhill Academy, concluded his academical career at the Literary Institute at New Hampton. At the age of eighteen he entered the office of Josiah Quincy, a leading lawyer of Grafton County, supporting himself in the meantime by teaching school, and was admitted to the Bar in 1827. Removing to the western part of Maine, he finally established himself in the town of

Newfield, his removal having been suggested by Chief Justice Shepley, then a leading lawyer in the city of Saco. He soon found occupation. Many land titles were unsettled, and an extensive lumber business was in operation, and as a result of these conditions, litigation, settlements and contracts of great variety called for the services of a well-trained, judicious and able lawyer. At this time the bar of York County was distinguished for its ability. Not long after his settlement here, he was married to Hannah, the eldest daughter of Captain James Ayer, at that time a leading citizen of the town. He was early led towards political life, and had always been a Democrat. In 1830 he was elected to represent his district in the State Legislature, serving until 1834, being Speaker of the House for a part of the time. He was then appointed Attorney-General of the State, and after holding the position for four years, was elected to Congress, in which body he served until 1843. During the Presidential canvass of 1840, he advocated the re-election of Van Buren, meeting in public discussion many of the most distinguished Whig orators, and winning for himself the reputation of being the most eloquent champion of Democracy. In 1846 he was Attorney-General of the United States in the cabinet of President Polk. While adjusting the terms of the Treaty of Peace between the United States and Mexico, he went to the latter country as United States Commissioner with the full powers of an Envoy Extraordinary and Minister Plenipotentiary, and it was largely owing to his diplomatic skill and tact that the treaty of Guadalupe Hidalgo was arranged with the Mexican government by which California became a part of the United States. He was a warm advocate of the annexation of the territory secured; he foresaw the importance of the western country to our grandeur as a nation, the impulse it would



give to our development, and the necessity of a Western coast line in establishing commerce with the empires of the East. In 1849 he returned to the practice of his profession, removing to the City of Portland, which remained his place of residence until his death.

Here he met in professional conflict such men as John Rand, an experienced and exact lawyer, John M. Adams, who subsequently became his partner, Samuel Wells, afterwards a Judge of the Supreme Court of the State, and William Pitt Fessenden, the distinguished Senator of the United States. In 1858 he was appointed by President Buchanan to the position of Associate Justice of the Supreme Court, his commission being dated the 12th of January of that year. At this time all the District Judges in his circuit were old men. The dockets were crowded with cases, many of them of long standing, and an enormous amount of labor devolved upon the new Judge, but he applied himself with great energy and success. One who knew him well writes: "He was bitterly opposed to anything like judicial legislation. He shrank from strong or forcible constructions based on statutory phraseology only. He sought simply for legislative intention. He saw in the Court the administrator and expounder of the law and the arbiter of each special litigation. He was content to explain the law as it was, excepting when the question of Constitutionality arose. He considered the separate functions of the judicial and legislative branches, as imparted by the Constitution, imposed clearly separate duties on each, which he was not at liberty in the minutest degree to disregard. The wisdom or folly of a law enacted by Congress he was not to direct or influence by judicial construction."

In 1877, as the oldest Associate Justice, he was selected as President of the Electoral Commission, charged with the

duty of deciding upon the character of the returns of the Presidential election from the States of Louisiana, Florida, South Carolina and Oregon. Although Mr. Clifford was a firm believer in the fact of Mr. Tilden's election, he conducted the proceedings with firm and unvarying impartiality. He delivered an opinion upon the question of the Florida returns in accordance with that of the minority, but declined to give any judgments upon the votes of the other contested States. Subsequent to the inauguration of Mr. Hayes he refused to visit the White House.

In October, 1880, he was attacked with serious illness, and owing to a complication of disorders it became necessary to amputate one of his feet to prevent gangrene. From this he never recovered, but died on the 25th of January, 1881.

His opinions form a large part of the forty volumes of Reports, beginning with the latter volumes of Howard, and continuing through Black, Wallace and Otto. His judgments upon the Circuit are embodied in four volumes of Clifford's Reports, edited by his son, William Henry Clifford, Esq., of the Cumberland Bar. After the death of Chief Justice Chase he was acting Chief Justice until the appointment of Chief Justice Waite.

Noah H. Swayne, of Ohio, was appointed an Associate Justice in place of John McLean, deceased, and was commissioned upon the 24th of January, 1862. He was born in Culpepper County, Virginia, on the 7th of December, 1804, and was a descendant of Francis Swayne, who had immigrated to this country in the days of William Penn, accompanied by his family, and settled near Philadelphia. Joshua Swayne, the father of the Judge, who retained his membership in the Society of Friends, removed to the town of Waterford, Virginia, where he gave his son a liberal educa-



W. H. Wynne



tion. The early studies of the lad were directed towards the medical profession, and at one time he served as an apothecary's clerk in Alexandria. Through the death of his teacher this plan was interrupted. Having lost his father not long afterwards, and his mother being unable to provide for his support while pursuing a collegiate course, he began the study of the law in Warrenton, and was admitted to the Bar in 1823. Two years later he removed to Ohio, opening an office in Coshocton, where he became prosecuting attorney of the county. He was then elected a member of the Ohio Legislature as a Jeffersonian Democrat. In 1830 he was appointed, by President Jackson, District Attorney of the United States, and removed to Columbus. During his service of ten years in that capacity, he declined the office of President Judge of the Court of Common Pleas. He served, however, as a Commissioner to manage the State debt, and as a member of a Committee sent by the Governor to effect a settlement of the boundary lines between the States of Ohio and Michigan, and in 1840 became one of a committee appointed to inquire into the condition of the State Blind Asylum. Becoming interested in public charities, he ever afterwards took a leading part in organizing and visiting asylums and institutions for the blind, the deaf and dumb, and lunatics. His views upon the question of slavery, as well as his personal kindness of disposition, led him, as early as 1832, to emancipate a number of slaves acquired by his marriage. His practice in the meantime had become large and lucrative through constant and unremitting attention to its requirements, and one of the most celebrated of his efforts was his defence of William Rossane and others, in the Circuit Court of the United States held at Columbus in 1853, charged with burning the steamboat *Martha Washington* for the fraudulent

purpose of obtaining the insurance. He also appeared as counsel in fugitive slave cases, and joined the Republican Party upon its formation. So prominent had he become through his bold utterances upon public questions that, upon the 14th of January, 1862, he was appointed by President Lincoln one of the Associate Justices of the Supreme Court at the most critical hour in the history of that tribunal. His views, as expressed in his opinions upon Constitutional questions, were in favor of a firm and uncompromising support of nationality. He struck a high note and maintained it. In the original *Legal Tender* case he dissented from the opinion, which denied full effect to the Act of Congress. He dealt with a vast number of subjects, and became a leader in contending for the existence of a general commercial jurisprudence, which the Supreme Court of the United States was at liberty to recognize and develop in cases involving no Federal question, in opposition to the decisions of the State tribunals. His views were in direct opposition to those of his distinguished colleague, Mr. Justice Miller, and it is through his opinions, in *Gelpcke v. The City of Dubuque*<sup>1</sup> and similar cases, that the doctrine of *Swift v. Tyson* obtained a firm foothold in the Court. In his last opinion he considered fully the important subject of the income tax imposed by the United States, and defined clearly and authoritatively the meaning of the phrase "direct taxes," as used in the Constitution.<sup>2</sup>

In 1863 he received the degree of LL.D. from Dartmouth and Marietta Colleges, and in 1865 from Yale. A judge of unusual capacity, familiar with adjudged cases, and with settled habits of labor and research, of genial and benevolent courtesy,

<sup>1</sup> 1 Wallace, 175 (1863).

<sup>2</sup> *Springer v. The United States*, 102 U. S., 586 (1880).





Sam F. Miller



singularly amiable in disposition, and patient even with the dullest, he won not only the cordial esteem, but the warmest affections of the bar.

The second of the appointees of President Lincoln was Samuel Freeman Miller, who was commissioned upon the 16th of July, 1862. Two vacancies existed at the time of his appointment, one caused by the death of Mr. Justice Daniel, and the other by the resignation of Mr. Justice Campbell. Mr. Miller was not named especially for either. He was born of pioneer stock in Richmond, Kentucky, upon the 5th of April, 1816, amid humble surroundings. His father had removed from the town of Reading, in Pennsylvania, some years before, and, shortly after his arrival, purchased a farm upon which the early years of his distinguished son were spent. Like his associate, Mr. Justice Swayne, he found employment in a drug-store and turned his attention to the study of medicine, and upon reaching manhood spent two years in the Medical Department of the Transylvania University, from which he graduated in 1838. For nearly ten years he practiced medicine in Knox County, Kentucky, but, although meeting with success, determined to study law, and was duly admitted to the bar in 1847 at the age of thirty. He strongly hated African slavery and did much to promote the cause of freedom, although he took no active part in politics until after his removal to Iowa in 1850. Here he became the leader of the Republican Party. He was offered and declined numerous State and local offices, preferring to devote himself to his profession in which he took high rank. At a time when the Supreme Court was to be strengthened, if not re-organized, his name was presented to President Lincoln by the members of the bar and the politicians of both parties, sustained by members of Congress, and the singular unanimity of his support, as well as his reputa-

tion for ability of the highest order made such an impression as to win success. "The finding of such a judge by the President was only less fortunate than the finding of such a President by the country."

The position which he early acquired and ever maintained was that of a truly great jurist; logical, learned, wise, robust, rugged, simple and honest. It has been estimated that he wrote more opinions of the Court than any Judge living or dead, and more opinions in construction of the Constitution than any Judge who ever sat in the Supreme Court. Those opinions, more than seven hundred in number, including dissents, run through seventy volumes, and are marked by "strength of diction, keen sense of justice and undoubting firmness of conclusion."

The most important of them, perhaps the most important decision of the Court in its far-reaching effects since the Rebellion, was in the famous Slaughter House Cases, which has never been overruled or questioned since its delivery, as he himself was wont to assert in tones of conscious pride, although at the time most powerfully dissented from by the most eminent of his brethren.

As a Constitutional lawyer, a careful student of his career has pronounced him to be the most eminent authority since the days of Marshall. He had great capacity to seize upon the vital points of controversy and an instinctive command of general principles. A pronounced Federalist in his views of the scope of the powers of the General Government, he so tempered these leanings with a broad conservatism as to bring the Court to the preservation of an even balance between National supremacy and State autonomy. "The just and equal observance of the rights of the States and of the General Government, as defined by the present Constitution,"





*David Davis*

said he, "is as necessary to the permanent prosperity of our country and to its existence for another century as it has been for the one whose close we are now celebrating." At one time he meditated the preparation of a History of the Supreme Court and collected material to that end, but never put it into shape, but gave warm encouragement and hearty assistance to the present writer. His judicial style is clear, luminous, exact, and impressive, "like his tread, massive but vigorous."

Mr. Justice Miller was warmly interested in true professional education, and from time to time delivered addresses in various parts of the country, the most notable of which are entitled "The Constitution and the Supreme Court of the United States of America," delivered upon the 29th day of June, 1887, before the Alumni of the Law Department of Michigan, and the Memorial Oration, delivered at the Celebration of the One Hundredth Anniversary of the Framing and Promulgation of the Constitution of the United States, in Independence Square, upon the 17th of September, 1887, in the city of Philadelphia.

David Davis, of Illinois, was commissioned as an Associate Justice to fill one of the existing vacancies in the recess, October 17th, 1862, and re-commissioned upon confirmation on the 8th of December of the same year. He was a native of Cecil County, Maryland, where he was born upon the 9th of March, 1815. His ancestors were Welsh. He was a graduate of Kenyon College, Ohio, in 1832, and went to Massachusetts for the purpose of reading law under the direction of Judge Bishop, in Lenox, subsequently attending a course of lectures at the Yale Law School. In 1835 he removed to Illinois, and was admitted to the bar, finally settling in Bloomington. There he met Abraham Lincoln, and a lifelong attachment

was established between them. He was elected to the State Legislature in 1844, and was a member of the Convention that framed the State Constitution in 1847. In the following year he was chosen Judge of the Eighth Judicial Circuit of the State. He was twice re-elected to this post, and was discharging its duties at the time of his selection by Mr. Lincoln for the Supreme Court of the United States. His interest in politics had been ardent, and he had served as a delegate at large to the Chicago Convention which nominated Lincoln for the Presidency in 1860, and personally accompanied him on his journey to Washington. After the assassination of the President, Mr. Davis acted as administrator of his estate. His views upon Federal questions were pronounced, and he always upheld the highest exercise of Federal power, although in the celebrated Milligan case,<sup>1</sup> in sustaining the right of the prisoner to trial by jury, he gave offence to some partisans of the day. His opinion in this case is upon a right of such importance, and is expressed in terms so exalted, as "to be clothed with the heritage of immortality." He was one of the minority in the early Legal Tender cases, and contended earnestly in support of the Constitutionality of the power exercised by Congress in making Treasury notes a legal tender in payment of debts. His judicial style is bold and vigorous, but betrays a lack of polish and harmony, and at times his opinions received the revisionary touches of the more scholarly reporters.

In February of 1872 a National Convention of the Labor Reform Party nominated him as its candidate for the Presidency upon a platform that declared in favor of a national currency "based on the faith and resources of the nation and

<sup>1</sup> 4 Wallace, 107 (1866).

interchangeable with the 3.65 per cent. bonds of the Government," an eight-hour law, and the payment of the national debt "without mortgaging the property of the people to enrich capitalists." In answer to the letter informing him of his nomination, he wrote: "Be pleased to thank the Convention for the honor they have conferred upon me. The Chief Magistracy of the Republic should neither be sought nor declined by any American." His name was also used before the Liberal Republican Convention at Cincinnati during the same year, and ninety-two and a half votes were cast in his favor upon the first ballot. After the regular nominations had been made, he determined to retire from the contest, and so announced in his final answer to the Labor Reformers. His restlessness upon the Bench had become somewhat marked, and his habit—far from judicial—of freely expressing his views on public questions led to much uneasiness in relation to the probability of his becoming a member of the Electoral Commission. He was counted as hostile to the election of Mr. Hayes, and it was determined, if possible, to exclude him. The exigency did not arise, however, for he resigned his seat in the Supreme Court to take his place in the Senate of the United States, upon the 4th of March, 1877, to which he had been elected by the votes of Independents and Democrats to succeed John A. Logan. In the Senate he was rated as an Independent, or as the representative of a third party whose principles were unannounced, and acted most frequently with the Democrats. After the death of President Garfield in 1881 he was chosen President of the Senate. He resigned his Senatorial office in 1883, and retired to Bloomington, where he quietly resided until his death, which occurred on the 26th of June, 1886. He received the degree of LL.D. from Williams and Beloit Colleges, and the Wesleyan University.

The appointment of an additional Associate Justice was authorized by the Act of March 3rd, 1863, and Mr. Lincoln selected for the place thus created Stephen J. Field, of California, who was duly commissioned upon the 10th of March of the same year.

The new Justice, who is now the senior Associate, belongs to a remarkable family. The name is an ancient and honorable one in England, and can be traced back more than eight hundred years to Hubertus De la Feld, who came in the train of the Conqueror. His grandfathers served as officers in the War of the Revolution, and were descended from a Puritan stock, among the oldest in New England. With no exceptional advantages of early training, the living brothers of the Justice, as well as himself, have won a reputation that is world-wide. David Dudley Field, in the effort to reform systems of procedure and promote codification; Cyrus W. Field, in accomplishing that astounding triumph of science and commerce, the submarine telegraph, by which all parts of the world are now united; Henry Martyn Field, in wielding a powerful influence as the editor of one of the leading religious papers of the country, have made the name honored wherever it is known, while the talents of the sister of this extraordinary group of brothers are now represented upon the bench of the Supreme Court by her son, Mr. Justice David J. Brewer, who sits beside his uncle in the highest tribunal of the country.

Stephen Johnson Field was born in Haddam, Connecticut, on the 4th of November, 1816. He was the sixth son in a family of nine children. His father, the Rev. David D. Field, D.D., was a Congregational minister, who removed, in 1819, to Stockbridge, Massachusetts, where the childhood and early youth of the future jurist were happily passed. At the age





Max Rosenthal  
& Tayaaforte  
1890

Wm. Wm. Field



of thirteen, he accompanied his elder sister, the wife of the Rev. Josiah Brewer, a missionary, to Smyrna, for the purpose of studying Oriental languages, and thus qualifying himself for a professorship in an American University. He remained in the Levant two and a half years, visiting many islands of the Grecian Archipelago and famous cities of Asia Minor, and passing one winter in Athens, where he acquired a competent knowledge of modern Greek, and also of French, Italian and Turkish. Coming in contact with the members of many religions, Greek, Armenian and Mahometan, he relaxed the narrow creed of the Puritan, and became broadly tolerant. Returning to the United States in 1832, he entered Williams College, and was graduated in 1837 with the highest honors of his class. He then studied law in the office of his brother, David Dudley Field, and was admitted to the Bar in 1841. During a portion of this time he gave instruction to classes at the Albany Female Academy, and pursued his studies in the office of John Van Buren, then Attorney-General of the State. Upon his admission to the Bar, he entered into partnership with his brother, and the relation continued until 1848, when he severed it to travel extensively in Europe. Shortly after his return in the following year, he went to California, and arrived in San Francisco on the 28th of December, 1849, with ten dollars in his pocket. In the following January he established himself in the city of Marysville, became the first Alcalde of the town, and on the adoption of American institutions, a member of the Legislature. During the canvass, which he was obliged to conduct in person, he saw much of rough border and mining life, encountered some strange experiences, and succeeded in saving from a lynch jury a man charged with stealing gold dust. As a legislator, he accomplished during a single term

results which have proved lasting in their effect upon the interests of California and of all the States since formed in the extreme West. He gave to the usages, customs and voluntary regulations of the miners of gold the force of law, and thus laid the foundation for the mining system of the State. He planned a bill reorganizing the judiciary, and established codes of civil and criminal procedure. He also framed an exemption law for the benefit of poor debtors, which is remarkable for its comprehensive and liberal provisions.

Returning to the practice of his profession, which had been destroyed by a "judicial ruffian," he became one of the foremost lawyers of the State, and in the fall of 1857 was elected a Justice of the Supreme Court of the State. Before he could enter upon his term, a vacancy occurred through the death of one of the Justices, and he was appointed by the Governor to fill the unexpired term, and took his seat in October, 1857. Upon the resignation of Chief Justice Terry, he became, in 1859, Chief Justice of the State, and from this office was transferred to the Supreme Court of the United States upon the unanimous recommendation of the Senators and Congressmen of the States composing the new circuit, irrespective of politics. In the State Court he had proved himself to be, in the language of his associate, Judge Baldwin, the ablest jurist who ever presided in the Courts of California. He gave tone, consistency and freedom to her judicature, and laid broad and deep the foundations of her civil and criminal law. The land titles of the State received from his hands their permanent protection. Professor Pomeroy, in a careful study of Mr. Field's career, has stated his judicial qualities to be marked legal learning, the capacity, in an extraordinary degree, to acquire new knowledge and

skill to appropriate and to assimilate the materials thus obtained with the State or national law; devotion to principle; power of discovering, comprehending and applying principles to a new state of facts; creative power; ability to develop, enlarge and improve the law by means of the "legislative functions belonging to all superior Courts," and intellectual and moral fearlessness.

It was through a display of the latter trait in a decision as to the validity of a city ordinance requiring the queues of Chinese prisoners to be cut off, that he lost the Democratic support of California for the Presidency in 1880. This ordinance he held to be unconstitutional in that it was hostile and discriminating legislation against a class, and was inhibited by the spirit of the Fourteenth Amendment.

In his work in the Supreme Court of the United States he has kept steadily in view two principles—the preservation from every interference or invasion by each other of all the powers and functions allotted to the National Government and the State governments; and the perfect security and protection of private rights from all encroachment either by the United States or by the individual States.

In 1873 Mr. Justice Field was one of three Commissioners appointed by the Governor of California, to examine the codes of the State, and prepare such amendments as seemed necessary for the consideration of the Legislature. In 1877 he served as a member of the Electoral Commission, and acted steadily with the minority, expressing his opinions without qualification. In the summer of 1881 he re-visited Europe, extending his journey to the East as far as Athens and Smyrna, where he had spent several years of boyhood.

His life has been twice attempted. In 1865 he received through the mail a package containing a deadly machine, but

fortunately was prevented from opening it. Upon the inside was found pasted against the lid a copy of his decision in the Pueblo case, by which a large number of speculators and adventurers, who had occupied land in San Francisco as squatters, had been dispossessed. Quite recently his life was menaced by Judge Terry, a man notorious for violence, yet formerly his associate in the Supreme Court of California, who incensed at a decision adverse to his personal interests, assisted by his wife, attempted insult and assassination. Some months afterwards the Deputy United States Marshal, who was specially deputed as an attendant to protect the Justice in the performance of his duties, shot the man Terry in a railway eating-house as he was about to commit a deadly assault upon the Justice, and was seized upon a charge of murder by the Sheriff of San Joaquin County, in the State of California. The United States Circuit Court discharged Neagle from the custody of the Sheriff, and the matter came upon appeal before the Supreme Court of the United States. Under these trying circumstances Mr. Field conducted himself with the utmost courage and firmness.

Mr. Field took the oath of office on the 20th of May, 1863,—his father's birthday—thinking, with a touch of sentiment that is one of the graces of his character, that his aged parent would be gratified to learn that on the day on which he completed his eighty-second year his son had become a Justice of the Supreme Court of the United States.

A variety of interesting questions came before the Court thus constituted, growing directly out of a condition of war. The first of these is *Ex parte Vallandigham*,<sup>1</sup> which was a petition for a certiorari, to be directed to the Judge Advocate

<sup>1</sup> 1 Wallace, 243 (1863).

General of the Army of the United States, to send up to the Supreme Court for review the proceedings of a Military Commission. Clement L. Vallandigham, a noted member of Congress, had been tried and sentenced to imprisonment for stating, in a public speech in a town in Ohio, that the war was wicked, cruel and unnecessary, waged for the freedom of the blacks, and not for the preservation of the Union, and for charging that the United States Government was about to appoint military marshals to deprive the people of their liberties, and for inciting the people to resistance. The prisoner had denied the jurisdiction of the Military Commission, and had refused to plead upon arraignment. The plea of "Not Guilty" was entered for him by authority of the Commission, and the trial proceeded, the prisoner appearing in person, and cross-examining the witnesses. It was held in an exhaustive opinion by Mr. Justice Wayne that the appellate power of the Supreme Court did not extend to a review by certiorari of the proceedings of a Military Commission ordered by a General officer of the United States Army in command of a Military Department.

Several interesting questions of prize also arose, and the first opinion delivered by Chief Justice Chase was in the case of the *Circassian*,<sup>1</sup> in which he had occasion to consider what constituted a blockade, and how it could be made effectual, and whether the blockade of the Louisiana district was terminated by the occupation of the city of New Orleans by Federal forces on the 4th of May, 1862. It was held in the negative, the city itself being hostile, the opposing enemy being still in the neighborhood, the occupation being recent and limited, and subject to the vicissitudes of war. The

<sup>1</sup> 2 Wallace, 135 (1864).

Chief Justice laid it down as a rule of International law that a vessel sailing from a neutral port, with intent to violate a blockade, is liable to capture and condemnation, and is prize from the time of sailing, and that the evidence of this intent may be gathered from papers, letters, and the acts and words of the owners or hirers of the vessel, the shippers of the cargo and their agent, and especially from the spoliation of papers in apprehension of capture. Nor was the intent to violate the blockade disproved by evidence of a purpose to call at another port, not reached at the time of capture, with an ulterior destination to the blockaded port. In the cases of the *Bermuda*,<sup>1</sup> and the *Hart*,<sup>2</sup> the Chief Justice enters upon an interesting discussion of the rights of neutrals and belligerents, but held that as the cargoes were consigned to enemies, and the greater part of them consisted of goods which were contraband, they must share the fate of the vessels, which had been condemned because of suspicious acts, such as the spoliation of papers.

Another aspect of the same question arose in the case of the *Venice*,<sup>3</sup> in which protection under the proclamation of President Lincoln was extended to vessels and their cargoes belonging to citizens of New Orleans or neutrals residing there, and not affected by any attempts to run the blockade, or by any act of hostility against the United States.

In the case of the *Baigorry*,<sup>4</sup> duly affirmed in the cases of the *Josephine*,<sup>5</sup> and the *Admiral*,<sup>6</sup> it was held that the blockade of that part of the coast of Louisiana which had no direct connection with the port of New Orleans by navigation,

<sup>1</sup> 3 Wallace, 514 (1865).

<sup>2</sup> 2 Wallace, 258 (1864).

<sup>3</sup> 3 Wallace, 83 (1865).

<sup>4</sup> *Ibid.*, 559 (1865).

<sup>5</sup> 2 Wallace, 474 (1864).

<sup>6</sup> 3 Wallace, 603 (1865).



was not terminated by the proclamation of May 12, 1862, discontinuing the blockade of that port. In the case of *The Slavers*,<sup>1</sup> four libels of information and forfeiture were filed, alleging that the vessels seized had been equipped, loaded and fitted out at New York in the summer of 1860, for the purpose of engaging in the Slave Trade, in violation of the Acts of Congress of March 22, 1794, and April 22, 1818. Although the evidence was conflicting, yet it was held that a professed sale at an excessive price, a false crew-list, an equipment suitable to a slave voyage, a cargo not fully on the manifest, suspicious conduct on the part of the crew, and the appearance and subsequent disappearance of a person with a Spanish name as claimant, were circumstances, which, when unexplained, justified forfeiture.

In the case of *Mrs. Alexander's Cotton*,<sup>2</sup> the Chief Justice held that cotton in the Southern rebel districts, constituting as it did, the chief reliance of the rebels as the means for purchasing munitions of war, was a proper subject of capture, upon general principles of public law relating to war, even though such cotton was private property, belonging to one friendly to the Union, inasmuch as the personal disposition of the individual inhabitants of hostile territory, as distinguished from that of the enemy people generally, could not be taken into account, unless it could be shown that the relation of the district towards the United States had been changed by the action of the Government itself.<sup>3</sup>

Perhaps the most interesting case was that of the iron-

<sup>1</sup> 2 Wallace, 350 (1864).

<sup>2</sup> 2 Wallace, 404 (1865).

<sup>3</sup> The same principle was invoked and applied in the cases of the *Gray Jacket*, 5 Wallace, 342 (1866); the *Peterhoff*, 5 Wallace, 28 (1866); *United States v. Weed*, 5 Wallace, 62 (1866); and the *Sea Lion*, 5 Wallace, 630 (1866).

clad *Atlanta*.<sup>1</sup> Originally a British steamer, known as the *Fingall*, she had, early in the war, run the blockade of Savannah, and been converted into an iron-clad at an expense to the Confederate Government exceeding one million dollars. She carried a powerful ram, and had attached to her bow, and carried under water a torpedo charged with about fifty pounds of powder. Much was expected of her; it was predicted that she would raise the blockade of every Southern port and enter in triumph the sea-ports of the North, and as she steamed from Warsaw Sound to engage with two monitors belonging to the United States Government, the *Weehawken*, commanded by Captain Rogers, and the *Nahant*, commanded by Captain Downs, she was accompanied by several steamers thronged with passengers, eager spectators of what, it was anticipated, would prove an easy victory. The monitors slipped their cables and steamed towards the ocean for the purpose of gaining time to prepare for action. The *Atlanta* followed and opened fire upon the *Nahant*, whose guns were silent. The *Weehawken* first rounded and steamed towards the *Atlanta*, until within three hundred yards, when she slowed down and discharged her celebrated gun. The first shot carried a fifteen-inch ball, containing within a hollow sphere thirty-five pounds of powder and weighing four hundred pounds. The effect was to knock a hole in the casemate of the rebel ram, scattering splinters of wood and iron, wounding many men and prostrating as many as forty persons. The effect of this single shot was to demoralize the crew. A second shot struck the top of the pilot-house, crushing and driving down the bars, wounding both pilots and stunning the helmsman. The *Atlanta* immediately hauled down her colors and ran up a small white flag

<sup>1</sup> 3 Wallace, 425 (1865).

as token of surrender. The *Nahant* in the mean time had steamed into position with the intent of discharging a broadside. A claim was made in behalf of the *Nahant* as against the exclusive claim of the *Weehawken*, that as the combined force of the two monitors was superior to that of the *Atlanta*, both were to be regarded as capturing vessels, and that the crews of both monitors had a right to share in the prize money. This contention was sustained by Mr. Justice Field, although the argument of Mr. Reverdy Johnson in behalf of the *Weehawken* was not replied to by the Attorney-General of the United States, upon the principle that it was fair to assume that the advance of the *Nahant* upon the *Atlanta* at full speed with the intention, and doubtless with the ability to inflict injuries similar to those already inflicted by the *Weehawken*, might have hastened the surrender, and that it could hardly be supposed that the approach of the second monitor did not enter into the consideration of the captain and officers of the *Atlanta*; the mere fact that the only damage done and that the only shots fired were by the *Weehawken* was not decisive of the question. The *Atlanta* had descended the Sound to attack both, and had governed herself in reference to their combined action, and it was not reasonable to suppose that her course would have been the one pursued had she had the *Weehawken* only to encounter.

Another interesting class of cases arose from the efforts of the late Confederate States to restrain the enforcement of the Reconstruction Acts of Congress. The first was that of *The State of Mississippi v. President Johnson*,<sup>1</sup> in which the State sought to restrain, by injunction, the President of the United States from carrying into effect an Act of Congress

<sup>1</sup> 4 Wallace, 475 (1866).

which was alleged to be unconstitutional. An objection was raised, by the Attorney-General of the United States, upon a motion for leave to file a bill, that no such bill should be allowed to be filed in this Court, and the question of jurisdiction was elaborately argued. The Chief Justice, in delivering the opinion, drew the distinction between ministerial and executive duties, and pointed out that the cardinal vice in the argument of counsel for the State of Mississippi consisted of the assumption that the President, in the execution of the Reconstruction Acts, was required to perform a mere ministerial duty. It was shown that an attempt on the part of the Judicial department of the Government to interfere with the performance of Executive duties would be an absurd and excessive extravagance, and that if the President refused obedience it was needless to declare that the Court was without power to enforce its process; and if, on the other hand, the President complied with the order of the Court, and refused to execute the Acts of Congress, it was equally clear that a collision would occur between the Executive and Legislative departments of the Government, which would in all probability lead to the Impeachment of the President for such refusal, and that, in such a case, if the Court interfered in behalf of the President, thus endangered by compliance with its mandate, and sought to restrain by injunction the Senate from sitting as a Court of Impeachment, the strange spectacle would be offered to the public of an attempt by the Supreme Court to arrest Impeachment proceedings. Upon such grounds the motion was denied.

The question was raised a second time, in the case of *The State of Georgia v. Stanton*,<sup>1</sup> where a bill was filed by

<sup>1</sup>6 Wallace, 50 (1867).

the plaintiff State against the Secretary of War, the Secretary of State, and the General of the Army, to restrain them from carrying into execution laws which, it was alleged, would annul and totally abolish the existing State government of Georgia. In an opinion delivered by Mr. Justice Nelson it was shown that the question involved was purely political, and that the Court had no jurisdiction, the decision of Marshall in *The Cherokee Nation v. Georgia* being relied upon as conclusive authority against the exercise of any right or power on the part of the Court to interfere with political questions, for, as was said, "the rights for the protection of which our authority is invoked, are the rights of sovereignty, of political jurisdiction, of government, of corporate existence as a State, with all its Constitutional powers and privileges. No case of private rights infringed, or in danger of actual or threatened infringement, is presented by the bill in a judicial form for the judgment of the Court." The moralist might instance this as a decree of retributive justice, pronounced against the State of Georgia for her defiance of Marshall's judgment in the case of *Worcester v. Georgia*.

In the case of *Ex parte Milligan*<sup>1</sup> a question arose somewhat similar to that disposed of in *Ex parte Vallandigham*, which, although criticised at the time as a departure from doctrines thought to be essential to the preservation of the Union, has now come to be regarded as one of the leading decisions in favor of personal liberty, and in support of the rights of the citizen, to be found in our national jurisprudence. It was held upon an application for a writ of *habeas corpus* that a Military Commission had no jurisdiction to try and sentence one not a resident of one of the rebellious States

<sup>1</sup>4 Wallace, 2 (1866).

nor a prisoner of war, and that a citizen of a State not in open rebellion, who was never in the military or naval service, but who was, while at home, arrested by the military power of the United States, imprisoned, and tried, and sentenced to be hanged by a Military Commission for words spoken in a public speech, was not subject to martial law, but was entitled, under the Constitution, to the right of trial by jury. It was further held that martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction, and that though the suspension of the privilege of the writ of *habeas corpus* had been pleaded, yet that did not suspend the writ itself; that the writ issued as a matter of course, and upon the return made, the court would decide whether the party applying was to be denied the right of proceeding further.

In the greatly celebrated case of *The State of Texas v. White*<sup>1</sup> the nature of a State under our Constitution, and the effect of an attempted secession, were exhaustively considered. The suit was an appeal to the original jurisdiction of the Court by the State of Texas claiming certain bonds of the United States as her property, and asking for an injunction to restrain the defendants from receiving payment from the National Government, and to compel the surrender of the bonds to the State. To this it was replied that Texas had withdrawn from the Union, and had not been rehabilitated. The magnitude and importance of the question excited the greatest interest, and the opinion of the Chief Justice is a most elaborate review of the nature of our government.

"The Union of the States," said he, "never was a purely artificial and arbitrary relation. It began among the colonies, and grew out of

<sup>1</sup>7 Wallace, 700 (1868).

common origin, mutual sympathies, kindred principles, similar interests, and geographical relations. It was confirmed and strengthened by the necessities of war, and received definite form and character and sanction from the Articles of Confederation. By these the Union was solemnly declared 'to be perpetual' and when these Articles were found to be inadequate to the exigencies of the country, the Constitution was ordained 'to form a more perfect Union.' It is difficult to convey the idea of indissoluble union more clearly than by these words. What can be indissoluble if a perpetual union made more perfect is not? But the perpetuity and indissolubility of the Union by no means implies the loss of distinct and individual existence, or of the right of self-government by the States. Under the Articles of Confederation each State retained its sovereignty, freedom, and independence, and every power, jurisdiction, and right not expressly delegated to the United States. Under the Constitution, though the powers of the State were much restricted, still all powers not delegated to the United States nor prohibited to the States, are reserved to the States respectively, or to the people, and we have already had occasion to remark at this term that the people of each State compose a State having its own government and endowed with all the functions essential to separate and independent existence, and that without the States in union, there could be no such political body as the United States. Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments are as much within the design and care of the Constitution as the preservation of the Union, and the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States."

From this judgment Mr. Justice Grier dissented on the ground that the case was to be decided upon the basis of political facts and not of legal fictions; that the Court was bound to know and notice the public history of the nation, and that with a due regard for the truth of history during the past eight years, he could not discover that the State of Texas

remained as one of the United States. Adopting the definition of a State given by Chief Justice Marshall in *Hepburn v. Ellzey*,<sup>1</sup> he contended that as Texas was not represented upon the floor of Congress by members chosen by the people of that State, nor by Senators to represent her as a State in the Senate of the United States, and as she did not participate in the late election of President, but was then held and governed as a mere province, by military forces, that she did not fulfill the requirements of the definition.

In this dissent he was joined by Justices Swayne and Miller, all of them being of the opinion that the Court was bound by the acts of the Legislative department of the Government in relation to the State. The decree, however, as entered, gave to the State of Texas the relief sought by her bill.

Several important cases, decided in 1870, presented a variety of questions growing out of the Rebellion.

In the *Grapeshot*<sup>2</sup> the power of the President to establish provisional courts, in portions of insurgent territory occupied by the National forces, for the consideration of causes arising under the laws of the State and United States, was sustained. At the close of the war all cases pending in these courts were transferred to the United States Circuit Court for the proper district, with the same effect as if originally brought there.

In *United States v. Anderson*,<sup>3</sup> the 20th of August, 1866, was fixed as the time when the Rebellion was suppressed as respects the rights intended to be secured by the Captured and Abandoned Property Act.

In *United States v. Keebler*,<sup>4</sup> it was held that a payment made by a United States officer, of certain public moneys in

<sup>1</sup> 2 Cranch, 452, (1805).

<sup>2</sup> 9 Wallace, 129 (1869).

<sup>3</sup> 9 Wallace, 56 (1869).

<sup>4</sup> 9 Wallace, 83 (1869).



his hands, to the Confederate Government, under a so-called act of sequestration, did not discharge his bond. Mr. Justice Miller held that it could not be admitted for a moment that the statute of the Confederate States, or the order of its Postmaster-General, could have the legal effect of making the payment valid; that the whole Confederate power must be regarded as a usurpation by unlawful authority, incapable of divesting, by an act of its Congress, or an order of one of its departments, any right or property of the United States.

In *Hickman v. Jones*<sup>1</sup> it was held that the Rebellion was only an insurrection, that there was no rebel Government *de facto* in such a sense as to give any legal efficacy to its acts; that although for the sake of humanity certain belligerent rights were conceded to the insurgents in arms, yet such partial recognition did not extend to the pretended Government of the Confederacy. Therefore an act of the Confederate Congress creating a court was void; the court was a nullity, and could exercise no rightful jurisdiction, and could give no protection to those who assumed to be its officers.

In *United States v. Lane*<sup>2</sup> a contract for Confederate cotton was held to be illegal, and a vessel and cargo engaged in illegal traffic with the enemy were said to be properly seized.

In *Thorington v. Smith*<sup>3</sup> it was held that a contract for the payment of Confederate notes made during the Rebellion between parties residing within the so-called Confederate States could be enforced in the Courts of the United States, and that, under certain limitations, obligations assumed by a

<sup>1</sup> 9 Wallace, 197 (1869).

<sup>2</sup> 8 Wallace, 185 (1868). See also *Morris's Cotton*, *Ibid.*, 507 (1869).

<sup>3</sup> *Ibid.*, 1 (1868).

Government *de facto*, in behalf of the country or otherwise, will in general be respected by the Government *de jure* when restored; that Confederate notes must be regarded as a currency imposed on the community by irresistible force, and that a party stipulating for payment in Confederate dollars could recover their actual value at the time and place of the contract in lawful money of the United States.

In the case of the *Protector*<sup>1</sup> it was held that the time during which the war lasted was not to be counted in reckoning the time allowed for an appeal from an Alabama Court.

In *Boyce v. Tabb*<sup>2</sup> it was held that it was not a legal defence to a suit on a promissory note executed in Louisiana in 1861, that the note was given for the price of slaves sold to the maker; that contracts relating to slaves, valid at the time they were made, were not impaired by the Thirteenth Amendment to the Constitution. The opinion was delivered by Mr. Justice Davis, the case being in direct line with the previous decisions of *White v. Hart*<sup>3</sup> and *Osborn v. Nicholson*.<sup>4</sup>

In close connection with the cases arising out of the war are those which are known as the "Test Oath Cases," in which the meaning of the Constitutional clause prohibiting bills of attainder was fully settled and defined.<sup>5</sup> In the first of these the Constitution of the State of Missouri had imposed a test oath, known as the "Oath of Loyalty," upon all persons who should assume the duties of any office to which they might be appointed otherwise than by a vote of the peo-

<sup>1</sup> 9 Wallace, 687 (1869).

<sup>2</sup> 18 Wallace, 546 (1873).

<sup>3</sup> 13 Wallace, 647 (1871).

<sup>4</sup> *Ibid.*, 655 (1871).

<sup>5</sup> *Cummings v. Missouri*, 4 Wallace, 277 (1866). *Ex parte. Garland, Ibid.* 333 (1866).

ple, and it was expressly provided that no person should be competent as a bishop, priest, deacon, minister, elder or other clergyman of any religious persuasion, sect or denomination, to preach, teach, or solemnize marriages unless he had first taken the oath. Cummings, who was a Catholic priest, had refused to be sworn, and had been indicted, tried and convicted, and sentenced to pay a fine. On appeal to the Supreme Court of the State, the judgment was affirmed, and the case was then brought to the Supreme Court of the United States. It was argued with supreme ability by Montgomery Blair, David Dudley Field and Reverdy Johnson for Mr. Cummings, and by Mr. Strong and Senator Henderson, of Missouri, for the State. The opinion was delivered by Mr. Justice Field, in which he held that the test oath prescribed was a violation of that provision of the Constitution of the United States which provided that no State shall pass any bill of attainder or *ex post facto* laws; that a bill of attainder is a legislative act which inflicts punishment without judicial trial, and that an *ex post facto* law is one which imposes a punishment for an act which was not punishable at the time it was committed, or which imposes additional punishment to that originally prescribed; that disqualification from office or from the pursuits of an office or lawful vocation is a punishment. Chief Justice Chase and Justices Miller, Swayne, and Davis dissented.

The next case was that of Mr. Garland, and involved the validity of the "Iron-clad Oath," as it was termed, prescribed for attorneys by the Act of Congress of January 24th, 1865. Mr. Garland, subsequently Attorney-General of the United States, had been a member of the Bar of the Supreme Court of the United States prior to the Civil War, but when the State of Arkansas passed her ordinance of secession, had fol-

lowed her out of the Union, and was one of her representatives in the Congress of the Confederacy. In July of 1865 he received from the President a full pardon for all offences committed by his participation in the rebellion, and at the following term of the Court produced his pardon, and asked permission to continue to practice as attorney and counsellor, without taking the oath required by the Act and the rule of Court made in conformity with it, as he was unable to take it because of the offices he had held under the Confederate Government. Mr. Justice Field, delivering the opinion of the Court, held that the Act was unconstitutional and void, and that exclusion from any of the professions, or any of the ordinary vocations of life for past conduct, could be regarded in no other light than as punishment; that all enactments of the kind were subject to the Constitutional prohibition against the passage of bills of attainder. Besides this, the pardon of the President relieved the petitioner from the oath required. Mr. Justice Miller again dissented, in which he was joined by Justices Swayne and Davis. The ground of the dissent was stated to be that the National Legislature had the right to exclude from office and places of high public trust, the administration of whose functions are essential to the very existence of the Government, those among its own citizens who had been engaged in a recent effort to destroy that Government by force, and that it was hoped that the exceptional circumstances which gave importance to the case would soon pass away, and that the conduct of the persons affected by the legislation would afford sufficient cause to justify its repeal or essential modification.

A similar result was reached in the case of *Pierce v. Car-skadon*,<sup>1</sup> upon the ground that any act of a State which de-

<sup>1</sup> 16 Wallace, 234 (1867).

prived defendants of an existing right for past misconduct and without a judicial trial partook of the nature of a bill of pains and penalties, and was subject to the Constitutional prohibition. Mr. Justice Field again delivered the opinion of the Court, Mr. Justice Bradley dissenting on the ground that the test oath in question was as competent for the State to exact as a war measure in time of civil war.

A singular instance of legislative interference with the right of the Court to consider a question properly before it occurs in *Ex parte McCardle*,<sup>1</sup> which was twice before the Court. McCardle had been arrested and held in custody by a Military Commission, organized in the State of Mississippi under the Reconstruction Acts, upon charges of disturbing the public peace, inciting to insurrection, and impeding reconstruction. He duly applied to the Circuit Court of the United States for the proper district for a writ of *habeas corpus*, which was accordingly issued, but upon the return of the officer, displaying his authority, the prisoner was remanded. From this judgment he appealed to the Supreme Court. As the case involved the validity of the Reconstruction Acts, it excited universal interest, and was argued by counsel of the greatest professional eminence. Judge Sharkey and Robert J. Walker, of Mississippi, David Dudley Field and Charles O'Connor, of New York, and Jeremiah S. Black, of Pennsylvania, appeared for the appellant, while Matthew H. Carpenter of Wisconsin, Lyman Trumbull, of Illinois, and Henry Stanbery, Attorney-General of the United States, appeared upon the other side. Before the case was decided, an Act was introduced into Congress repealing so much of the law as authorized the appeal to the Supreme Court from the judgment of the Circuit Court

<sup>1</sup> 6 Wallace, 318 (1867); 7 Wallace, 506 (1868).

on writs of *habeas corpus*, or the exercise of jurisdiction on appeals already taken. The President vetoed the bill, but Congress passed it over his veto, and it became a law. While the Act was pending in Congress, the attention of the Court was called to it, and Mr. Justice Grier wrote a brief but forcible protest against any postponement of the decision of the case until the Act should be disposed of. In this protest Mr. Justice Field concurred. The validity of the Act, however, was sustained in an opinion by the Chief Justice, in which it was held that no judgment could be rendered in a suit after the repeal of the Act under which it had been brought and prosecuted. "It is quite clear," said he, "that this Court cannot proceed to pronounce judgment in this case as it has no longer jurisdiction of the appeal, and judicial duty is not less fitly performed by declining ungranted jurisdiction, than in exercising formally that which the Constitution and laws confer."

In *Corbett v. Nutt*<sup>1</sup> and *Miller v. The United States*<sup>2</sup> the Constitutionality of the Confiscation Act came directly before the Court. The validity of the Act was sustained by Mr. Justice Strong, upholding the power of Congress to legislate for the punishment of offences against the sovereignty of the Union, and declaring that the portion which provided for the confiscation of the property of rebels was passed in the exercise of the war powers of the Government. Justices Field, Clifford and Davis dissented, the two former because of the character of the Act, the latter because of the character of the property seized.<sup>3</sup>

<sup>1</sup> 10 Wallace, 464 (1870).

<sup>2</sup> 11 Wallace, 268 (1870).

<sup>3</sup> See also *McVeigh v. Windsor*, 11 Wallace, 259 (1870). *Osborne v. United States*, 91 U. S., 475 (1875); *Windsor v. McVeigh*, 93 U. S., 274 (1876).

In *Conrad v. Wafles*<sup>1</sup> the Court held that the Act in its provisions for the confiscation of property applied only to the property of persons who thereafter might be guilty of acts of disloyalty and treason, and that the provisions declaring all transfers of property by enemies null and void, only invalidated the transaction as against the right of the United States to claim the forfeiture of the property.

And in *Burbank v. Conrad*<sup>2</sup> it was held that by the decree of condemnation under the Act, the United States acquired only the life estate of the alleged offender actually possessed by him at the time of its seizure, and that accordingly a previous sale, although not recorded, was not affected.

Several cases came before the Court on appeal from the Court of Claims, which had been brought for the recovery of the proceeds of cotton seized by officers of the United States under the Captured and Abandoned Property Act of March 12th, 1863. In *Padelford's case*,<sup>3</sup> the petitioner having taken the oath of allegiance prescribed by the proclamation of President Lincoln, of December 8th, 1863, and kept it inviolate, it was held that he was entitled to claim the proceeds of cotton subsequently seized and sold under the Act; that the effect of the Presidential pardon, in the eye of the law, was to make the offender as innocent as if he had never committed the offence; that the pardon had purged him at the time of the seizure. In the words of the Chief Justice, "The law made the grant of pardon a complete substitute for proof that he gave no aid or comfort to the rebellion."

In *Klein's case*<sup>4</sup> the validity of an Act of Congress which undertook to do away with the effect and operation of a pardon was brought to the notice of the Court. The Court held

<sup>1</sup> 96 U. S., 279 (1877).

<sup>2</sup> *Ibid.* 291 (1877).

<sup>3</sup> 9 Wallace, 531 (1869).

<sup>4</sup> 13 Wallace, 129 (1871).

the Act to be unconstitutional, as being in substance an attempt to prescribe to the Judiciary the effect to be given to the previous pardon of the President. "It is clear," said the Chief Justice, "that the Legislature cannot change the effect of such a pardon any more than the Executive can change a law. Yet this is attempted by the provision under consideration. The court is required to receive special pardons as evidence of guilt, and to treat them as null and void. It is required to disregard pardons granted by proclamation on condition, though the condition has been fulfilled, and to deny them their legal effect. This certainly impairs the executive authority, and directs the Court to be instrumental to that end."

In *Mrs. Armstrong's case*<sup>1</sup> the Court declined to consider whether the evidence was sufficient to prove that the claimant had given aid and comfort to the rebellion, and held that the Presidential proclamation of pardon "was a public act of which all Courts of the United States are bound to take notice, and to which all Courts are bound to give effect."<sup>2</sup>

In various other cases the Court considered the legislative power of the insurgent States during the Civil War, and the extent to which the Confederate Government could be regarded as a *de facto* Government.<sup>3</sup>

It was held in general that all the enactments of the *de facto* legislatures in the insurrectionary States during the war, which were not in terms hostile to the Union or to the authority of the General Government, and which were not in conflict with the Constitution of the United States or of the States, had the same validity as if they had been the enact-

<sup>1</sup> 13 Wallace, 154 (1871).

<sup>2</sup> See also *Knote v. United States*, 95 U. S., 154 (1877).

<sup>3</sup> *Horne v. Lockhart*, 17 Wallace, 580 (1873). *United States v. Insurance Companies*, 22 Wallace, 103 (1874). *Sprott v. United States*, 20 Wallace, 464 (1874).



ments of legitimate legislatures. Any other doctrine than this, it was asserted, would work great and unnecessary hardship upon the people of such States without any corresponding benefit to the citizens of other States, and without any advantage to the National Government.<sup>1</sup>

The Court also sustained the right of citizens not in the military service, in States where the several Courts were open and in the undisturbed exercise of their jurisdiction, to protection from military arrest and imprisonment during the war.<sup>2</sup>

The same protection was extended to officers and soldiers of the Army of the United States in the enemy's country during the war.<sup>3</sup> And in the case of *Dow v. Johnson*,<sup>4</sup> the point was determined that an officer of the Army of the United States, while in service in the enemy's country, was not liable to a civil action in the courts of that country for injuries resulting from acts of war ordered by him in his military character, and that he could not be called upon to justify or explain his conduct in that civil tribunal, his responsibility being only to his own Government and its laws.

The obligation of contracts was considered in the *Binghamton Bridge Case*,<sup>5</sup> in which the doctrines of the Dartmouth College case were again affirmed and enforced in the strictest manner. An interesting contrast is presented by *Bridge Proprietors v. Hoboken Company*,<sup>6</sup> in which an act of the State of New Jersey, passed in 1790, creating a turnpike company, had given certain commissioners power to make a

<sup>1</sup>See opinion of Mr. Justice Strong in *United States v. Insurance Companies*, 22 Wallace, 103 (1874).

<sup>2</sup>*Beckwith v. Bean*, 18 Wallace, 510 (1873).

<sup>3</sup>*Coleman v. State of Tennessee*, 97 U. S., 509 (1878).

<sup>4</sup>100 U. S., 158 (1879).

<sup>5</sup>3 Wallace, 51 (1865). See also *Turnpike Co. v. State*, *Ibid.*, 210 (1865).

<sup>6</sup>1 Wallace, 116 (1863).

contract with any person for the building of a bridge over the Hackensack River: it was provided that the contract should be binding on the parties so contracting as well as on the State, and that it should not be lawful for any person whatsoever to erect any other bridge for a term of ninety-nine years. It was held that although this was a contract which could not be impaired, yet a railway viaduct consisting of a structure made so as to lay iron rails thereon, on which engines and cars could be propelled, but which could not be crossed by man or beast except in railway cars, was not a bridge in the sense of the Act of 1790. Mr. Justice Miller, in delivering the opinion of the Court, after admitting that those who built the bridge were entitled to protection against the erection of another bridge, and that the grant of tolls for a period of ninety-nine years had created a necessary monopoly, without which the corporators would not have invested their money, pointed out that in the course of seventy years the progress of the world in the arts and sciences had been so rapid, and human enterprise had introduced such radical changes in the means of transportation of persons and property, including those of crossing water-courses, both large and small, to which steam was applied, as to work a revolution, and that the word "bridge," in the ancient statute ought not to be and could not be construed in a broad sense so as to arrest the march of improvement.

Mr. Justice Grier concurred, contending that the proposition that one legislature could restrain the power of future legislatures from erecting bridges for ninety (and if ninety, a thousand) years, for a distance of ten miles (and if ten, an hundred), would hardly be assented to by any one.<sup>1</sup>

<sup>1</sup>The obligation of contracts was still further discussed in *Curtis v. Whitney*, 13 Wallace, 68 (1871); *White v. Hart*, *Ibid.*, 646 (1871); *Pennsylvania College Cases*,

An interesting question is discussed in *Walker v. Whitehead*,<sup>1</sup> as to the extent to which laws, existing at the time and place of making a contract, and where it is to be performed, enter into, and form a part of it. It was held that wherever they affect the validity, construction, discharge, and enforcement of the contract, no subsequent legislation could alter them; that the ideas of validity and remedy are inseparable, and both are parts of the obligation which is guaranteed by the Constitution against impairment; and that though the States might change the remedy, if no substantial right secured by the contract be impaired, yet whenever such a result is produced by the act in question, to that extent it is void. This was followed by *Olcott v. County Board of Supervisors of Fond du Lac County*,<sup>2</sup> where it was held that if a contract when made was valid, under the Constitution and laws of a State as they had been previously enforced by its judicial tribunals, and as they were understood at the time, no subsequent act of the Judiciary or Legislature would be regarded by the Supreme Court of the United States as establishing its invalidity.

In the well-known case of *Gelpcke v. The City of Dubuque*,<sup>3</sup> which involved the power of municipal corporations to borrow money upon coupon bonds in aid of a railroad for public purposes, as the main question, the doctrine of a general commercial jurisprudence was discussed and the right of the Federal Courts to consider questions not of a Federal character and arrive at their own conclusions, irrespective of State decisions, was fully established. The case has been viewed as a radical departure from precedent and principle,

*Ibid.*, 190 (1871); *Tomlinson v. Jessup*, 15 Wallace, 454 (1872); *Walker v. Whitehead*, 16 Wallace, 314 (1872); *Olcott v. Supervisors*, *Ibid.*, 678 (1872).

<sup>1</sup> 16 Wallace, 314 (1872).    <sup>2</sup> 16 Wallace, 678 (1872).    <sup>3</sup> 1 Wallace, 175 (1863).

due doubtless to a desire to prevent an effort on the part of the community concerned to evade the payment of its debts. But it has become a root as prolific of much-dreaded consequences, as that planted in *Swift v. Tyson*, from which it was an offshoot.

Mr. Justice Swayne, after quoting the earliest State decisions in force at the time of the making of the contract, said:

"It is urged that all these decisions have been overruled by the Supreme Court of the State, \* \* \* and it is insisted that in cases involving the construction of a State law or Constitution, this Court is bound to follow the latest adjudication of the highest Court of the State. \* \* \* It cannot be expected that this Court will follow every oscillation that may occur. The earlier decisions, we think, are sustained by reason and authority. They are in harmony with the adjudications of sixteen States of the Union. \* \* \* It is the settled rule of this Court to follow the decisions of State Courts, but there have been heretofore in the judicial history of this Court many exceptional cases. We shall never immolate truth, justice and the law because a State tribunal has erected the altar and decreed the sacrifice."

From this view Mr. Justice Miller dissented in a most powerful opinion, declaring that the doctrine now announced by the Court

"was a step in advance of any heretofore decided on this subject; that advance is in the direction of a usurpation of the right which belongs to the State Courts to decide as a finality upon the construction of State Constitutions and State statutes. This invasion is made in a case where there is no pretence that the Constitution as thus construed is any infraction of the laws or Constitution of the United States."

He pointed out that the decision was in conflict with the former decisions of the Court,<sup>1</sup> and declared:

<sup>1</sup> *Leffingwell v. Warren*, 2 Black, 599 (1862). See an admirable and exhaustive article entitled "Decisions of the Federal Courts on Questions of State Laws," by Wm. M. Meigs, Esq., VIII Southern Law Review, 452, in which the departure, which

"The construction given to a State statute by the highest tribunal of such State is regarded as a part of the statute, and is as binding upon the Courts of the United States as the text. \* \* \* If the highest judicial tribunal of a State adopt new views as to the proper construction of such a statute, and reverse its former decision, this Court will follow the latest settled adjudications. For us to refuse to carry out this doctrine will lead to direct and unseemly conflicts with the Judiciary of the States."<sup>1</sup>

The same question arose in *Meyer v. The City of Muscatine*,<sup>2</sup> and was again confirmed in *Havemeyer v. Iowa County*,<sup>3</sup> where it was held that if the contract when made was valid by the Constitution and laws of the State as then expounded by the highest authority whose duty it was to administer them, no subsequent action by the Legislature or Judiciary could impair its obligations, and the Supreme Court of the United States would not follow the most recent decisions of the State Supreme Courts. In vain did Mr. Justice Miller in his dissenting opinion declare that he had been compelled at Circuit to commit to jail over one hundred of the best citizens of Iowa for obeying an injunction issued by a competent Court of their own State, founded, as they conscientiously believed, on the true interpretation of their own statute,—an injunction, which in his private judgment, they were legally bound to obey. In vain did he lament the conflict of authority. In vain did Chief Justice

is now a wide one, from the doctrines expressed by Chief Justice Marshall in *Elmendorf v. Taylor*, 10 Wheaton, 152 (1825), and Mr. Justice Washington in *Golden v. Prince*, 3 Washington C. C. Rep., 314 (1814), is traced through all the cases.

<sup>1</sup> *Shelby v. Guy et al.*, 11 Wheaton, 361 (1826). *McCluny v. Silliman*, 3 Peters, 277 (1830). *Van Rensselaer v. Kearney*, 11 Howard, 297 (1850). *Webster v. Cooper*, 14 Howard, 504 (1852).

<sup>2</sup> 1 Wallace, 384 (1863).

<sup>3</sup> 3 Wallace, 294 (1865). See also *Thomson v. Lee County*, 3 Wallace, 327 (1865). *Chicago v. Sheldon*, 9 Wallace, 50 (1869). *City v. Lamson*, *Ibid.*, 478 (1869).

Chase dissent. The doctrine was distinctly affirmed by Mr. Justice Swayne, sustained by a majority of the Court, that where a question involved in the construction of State statutes practically affects those remedies of creditors which are protected by the Constitution, the Supreme Court of the United States will exercise its own judgment on the meaning of the statutes irrespective of the decisions of the State Courts, and if it deems those decisions wrong will refuse to follow them. The same conclusion was reached in 1869 in the case of *Butz v. The City of Muscatine*,<sup>1</sup> and in *Township of Pine Grove v. Talcott*,<sup>2</sup> Mr. Justice Swayne again observing, "The question before us belongs to the domain of general jurisprudence. In this class of cases this Court is not bound by the judgments of the Courts of the States where the cases arise. It must hear and determine for itself."<sup>3</sup>

In still further illustration of the independence of the Federal Judiciary upon questions of general law, some striking features are presented by the case of *York County v. Central Railroad*,<sup>4</sup> — in which it was held that the common law liability of a common carrier might be limited by special contract if such exemption does not cover loss by negligence or misconduct—and by the case of *Railroad Co. v. Lockwood*,<sup>5</sup> where it was distinctly ruled by Mr. Justice Bradley in an opinion of surpassing power that a common carrier cannot stipulate for exemption from responsibility arising from the negligence

<sup>1</sup> 8 Wallace, 575 (1869).

<sup>2</sup> 19 Wallace, 666 (1873).

<sup>3</sup> Compare this decision with *Walker v. Board of State Harbor Commissioners*, 17 Wallace, 648 (1873), where it was held that in the construction of State statutes affecting the title to real property, where no Federal question arises, this Court will follow the adjudications of the highest Court of the State.

<sup>4</sup> 3 Wallace, 107 (1865). Affirming the case of *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 Howard, 344 (1848).

<sup>5</sup> 17 Wallace, 357 (1873).

of himself or his servants and that State decisions to the contrary will be swept aside.<sup>1</sup>

Several interesting questions arose relating to Patents, in which the general principle was laid down that patents for inventions are not to be treated as mere monopolies, and, therefore, odious in the eye of the law; but they are to receive a liberal construction, and under a fair application of the rule *ut res magis valeat quam pereat*, the rights of the inventor are to be upheld and not destroyed.<sup>2</sup> The diverse sciences of jurisprudence and mechanics were brought with memorable ability to bear as sister lights upon the matter in issue; and the precincts of law were converted into an Academy.<sup>3</sup>

The Police Powers of the States were fully considered. It was held that where a party was indicted in a State Court for doing an act contrary to the statute of a State, and set up a license from the United States under one of its statutes, and the decision of the State Court was against the right claimed, the Supreme Court had jurisdiction under the 25th Section of the Judiciary Act. But the power of the United States was not to be stretched to the point of making an act forbidden by a State a matter of meritorious conduct, nor had Congress the right to license any one to violate the criminal laws of a State.<sup>4</sup>

In the important case of *Crandall v. The State of Nevada*,<sup>5</sup> Mr. Justice Miller, in a most interesting opinion, held that a

<sup>1</sup> This decision practically annuls the decisions of State Courts, notably those of the State of New York where such contracts are held to be valid, if suit should be brought in a Federal Court. See also *Forepaugh v. Delaware, Lackawanna & Western R. R. Co.*, 128 Penna. St. 217 (1889).

<sup>2</sup> *Turrill v. R. R. Co.*, 1 Wallace, 491 (1863). *Burr v. Duryee*, *Ibid.*, 531 (1863).

<sup>3</sup> *Case v. Brown*, 2 Wallace, 320 (1864).

<sup>4</sup> *Van Allen v. Assessors*, 3 Wallace, 573 (1865). *McGuire's case*, 3 Wallace, 302 (1865). The License Tax cases, 5 Wallace, 462 (1866). *Purvear v. Commonwealth*, 5 Wallace, 476 (1866).

<sup>5</sup> 6 Wallace, 35 (1867).

State law imposing a capitation tax on passengers by railroad or stage-coach was unconstitutional, and that every citizen of the United States had a right to pass through a State without interruption as freely as in his own State. Relying upon the decisions of Marshall's day, he showed, by a most unanswerable course of reasoning, that the people of these United States constituted one nation; that they had a Government in which all were deeply interested; that this Government had necessarily a Capital established by law where its principal operations were conducted; that there sat its Legislature, composed of Senators and Representatives of the States and of the people of the States; that there resided the President, directing through thousands of agents the execution of the laws all over the land; that there was the seat of the Supreme Judicial authority of the nation to which all citizens had a right to resort in search of justice; that there were the Executive departments, administering the offices of the mails, of the public lands, of the collection and distribution of the public revenues, and of our foreign relations; that the Federal power had a right to declare and prosecute wars, and, as a necessary incident, to raise and transport troops through and over the territory of any State of the Union; that if this right were abandoned in any sense, however limited, upon the pleasure of a State, the Government itself might be overthrown by an obstruction to its exercise; that the citizen also had correlative rights; that he had a right to come to the seat of Government to assert any claim he might have, or to transact any business; that he had a right to seek its protection, to share its offices, or engage in administering them; to enjoy free access to its seaports, and that these rights were in their nature independent of the will of any State over whose soil he must pass in the exercise of them.



"We are all citizens," said he, "of the United States, and as members of the same community must have the right to pass and repass through every part of it without interruption as freely as in our own States, and a tax, imposed by a State for entering its territory or harbors, is inconsistent with the rights which belong to citizens of other States as members of the Union, and with the objects which that Union was intended to attain. Such a power in the States could produce nothing but discord, or mutual irritation, and they very clearly do not possess it."<sup>1</sup>

The act was held void upon the ground that it conflicted with the Commerce clause of the Constitution.

Another illustration of the same principle is found in *Steamship Company v. Portwardens*,<sup>2</sup> in which it was held that an act providing that the Masters and Wardens of a port within a State should be entitled to receive, in addition to other fees, five dollars for every vessel arriving in port, was a regulation of commerce, and a duty on tonnage, and therefore unconstitutional and void.

So also in the case of the *State Freight Tax*,<sup>3</sup> it was held that inter-State transportation of freight was not subject to State taxation, and that such a tax was a regulation of inter-State transportation, and therefore a regulation of commerce among the States, and hence unconstitutional and void. The opinion was delivered by Mr. Justice Strong, and all previous decisions of the Court were thoroughly and carefully reviewed.<sup>4</sup>

In contrast with these cases is the conclusion reached in *Osborne v. The City of Mobile*,<sup>5</sup> in which an ordinance re-

<sup>1</sup>See the Passenger Cases, 7 Howard, 283 (1849; *Brown v. State of Maryland*, 12 Wheaton, 419 (1827); *McCulloch v. Maryland*, 4 Wheaton, 316 (1819).

<sup>2</sup>6 Wallace 31 (1867).

<sup>3</sup>15 Wallace, 232 (1867).

<sup>4</sup>See *Almy v. State of California*, 24 Howard, 169 (1860). *Woodruff v. Parham*, 8 Wallace, 123 (1868).

<sup>5</sup>16 Wallace, 479 (1872).

quiring that every express company or railroad company, doing business in that city, should pay an annual license fee, and imposing a fine for the violation of its provisions, was sustained, notwithstanding the fact that some of the railroads had business extending beyond the limits of the State. It was held that the license tax was upon a business carried on entirely within local limits, and the Court agreed that a tax on business, carried on within a State and without discrimination between its citizens and the citizens of other States, might be Constitutionally imposed and collected.

Several other notable cases under the Commerce clause arose, as in *Gilman v. The City of Philadelphia*,<sup>1</sup> in which the right of a State to erect a bridge across a navigable stream was sustained, under the power of the States to exercise concurrent jurisdiction. It was held that as the power to authorize the building of bridges had not been taken from the States, they might exercise such authority until restrained by the action of Congress. The opinion was delivered by Mr. Justice Swayne, who said:

“The case stands before us as if the parties were the State of Pennsylvania and the United States. The river being wholly within her limits, we cannot say the State has exceeded the bounds of her authority. Until the dormant power of the Constitution is awakened and made effective by appropriate legislation, the reserve power of the State is plenary, and its exercise in good faith cannot be made the subject of review by this Court.”

In the case of *Paul v. Virginia*<sup>2</sup> it was held that the law of a State requiring insurance companies of other States to enter security before they could issue policies in the State, was Constitutional, and that States might exclude a foreign corporation

<sup>1</sup> 3 Wallace, 713 (1865).

<sup>2</sup> 8 Wallace, 168 (1868).

entirely, or might exact such security for the performance of their contracts with their citizens, as in their judgment would best promote the public interest.<sup>1</sup>

In *Railroad Co. v. Fuller*<sup>2</sup> a State statute which required that each railway company should annually fix its rates for the transportation of passengers and freights of different kinds was not unreasonable nor unconstitutional, inasmuch as it amounted merely to a police regulation which was fully within the power of the States.<sup>3</sup>

Two other cases belonging to this period deserve a passing notice. In the case of *Bradley v. Fisher*,<sup>4</sup> the Court, in a most elaborate opinion by Mr. Justice Field, stated the correlative rights and duties of Court and Bar, and in *Bradwell v. The State of Illinois*<sup>5</sup> held that a woman had no right to demand admission to the Bar. The power of a State to prescribe qualifications for admission to the Bar of its own Courts was unaffected by the Fourteenth Amendment, and the reasonableness or propriety of the rules that might be adopted could not be reviewed in the Supreme Court, the right to practice law in the State Courts not being such a privilege or immunity of a citizen of the United States as to be within the protection of the Amendment.<sup>6</sup>

<sup>1</sup>This conclusion was distinctly affirmed in *Ducat v. Chicago*, 10 Wallace, 410 (1870). *Ins. Co. v. Massachusetts*, *Ibid.*, 573 (1870).      <sup>2</sup>17 Wallace, 560 (1873).

<sup>3</sup>These police regulations had been considered in the License Tax Cases, 5 Wallace, 462 (1866).      <sup>4</sup>13 Wallace, 336 (1871).      <sup>5</sup>16 Wallace, 130 (1872).

<sup>6</sup>In this connection it is interesting to note that up to the present time eight women have been admitted to practice in the Supreme Court of the United States under the terms of an Act of Congress:—Belva A. Lockwood, of Washington, D. C., March 3d, 1879; Laura De F. Gordon, of California, February 3d, 1883; Ada M. Bittenbender, of Lincoln, Neb., October 15th, 1888; Carrie B. Kilgore, of Philadelphia, Pa., January 8th, 1890; Clara S. Folte, of San Diego, Cal., March 4th, 1890; Lelia E. Santalle, of Boston, Mass., Emma M. Gillett, of Washington, D. C., April 8th, 1890; Marilla M. Ricker, of Washington, D. C., May 11th, 1891.

## CHAPTER XVIII.

THE SEVENTH EPOCH: 1870-1890: THE CLIMAX OF FEDERALISM: FINANCIAL LEGISLATION OF CONGRESS: THE EARLY LEGAL TENDER CASES: *BRONSON v. RODES*: *BUTLER v. HORWITZ*: *HEPBURN v. GRISWOLD*: THE UNCONSTITUTIONALITY OF PAPER MONEY DECLARED: CHANGES IN THE COMPOSITION OF THE COURT: THE LATER LEGAL TENDER CASES: *KNOX v. LEE*: *PARKER v. DAVIS*: DOCTRINE OF *HEPBURN v. GRISWOLD* REVERSED: THE CONSTITUTIONALITY OF PAPER MONEY ESTABLISHED: THE THIRTEENTH, FOURTEENTH AND FIFTEENTH AMENDMENTS: UNEXPECTED NARROWNESS OF CONSTRUCTION: THE SLAUGHTER HOUSE CASES; SKETCHES OF JUSTICES STRONG, BRADLEY AND HUNT.

WE now enter the seventh and last epoch in the history of the Court during the first century of its existence,—an epoch full of interesting developments of power, the most important political and moral achievements, marked by an enormous expansion of National authority, moderated but not restrained by an unexpected strictness of construction of the latest Amendments of the Constitution.

Our great Civil Strife had left among its legacies legislation relating to the finances which, although prompted by patriotic motives, had been adopted under the pressure and exigencies of war, and was still debated and perhaps debatable. Problems of the gravest character arose in relation to the Constitutional authority of Congress, and in the final adjudication and settlement of these the summit of Federalism was reached.

The downfall of slavery and the bestowal of the franchise upon the recently emancipated race, the adoption of the Thirteenth, Fourteenth and Fifteenth Amendments, by which the rights acquired and the results determined by the Civil War were placed under the guardianship of the Federal Government, gave birth to questions far-reaching and all-pervading in their consequences, profoundly interesting to mankind and of radical importance in their bearing upon the relation of the United States to the several States of the Union.

The right of the Nation to protect her own officers, judicial and ministerial, in the discharge of their duty, against personal violence and assassination, and the consequent extension of the Federal Judicial authority, by way of removal from State Courts, in cases both civil and criminal; the awakened moral indignation over the crime and shame of polygamy; a new realization of our duties towards our Indian wards; the conviction that involuntary political assessments levied upon office-holders for the purposes of a campaign were both tyrannical and corrupting; a clearer appreciation of the relations of the States in matters of commerce; the employment of the telegraph as an instrument of familiar communication,—these and a thousand cases of like import and character have evoked judicial powers of the highest order of excellence and have welded together the influences which have made us in truth a Nation. The services performed by the Court during the past twenty years are not of less importance to American nationality than the victories of the armies in the field, nor is its fame, honestly earned, of less value or less worthy of remembrance, in the estimation of every thoughtful lover of our institutions, than the brilliant reputations of the orators, the statesmen and the soldiers of the Civil War. The interests and the destinies of unnumbered

generations will be affected for weal or for woe by the work of the Court during this period.<sup>1</sup>

The most important and notable of the cases which arose,—certainly among the most celebrated that have ever been decided,—were those known as the “Legal Tender Cases,” which carried the implied powers of the Federal Government to an altitude never before reached, and the correctness of which has been seriously questioned by some of the highest legal authorities, notwithstanding the final decisions of the Court sustaining the Constitutional powers involved. The cases are remarkable, too, as presenting the first instance in the history of the tribunal of a solemn reversal by the Court of its former position, upon a question so fundamental, and a distinct overruling of its own judgment upon a matter solemnly argued and solemnly adjudicated. The action of the Court attracted wide-spread attention both at home and abroad, and has been thought to affect public confidence in the tribunal.<sup>2</sup>

<sup>1</sup>Two shadows rest upon its reputation,—the reversal of its own judgment in the Legal Tender Cases and the participation of five of its members in the work of the Electoral Commission. The time has not yet arrived for a consideration of either action which would be deemed free from prejudice.

<sup>2</sup>Mr. Bryce says: “Two of its later acts are thought by some to have affected public confidence. One of these was the reversal, first in 1871, and again upon broader but not inconsistent grounds, in 1884, of the decision given in 1870, which declared invalid the Act of Congress making Government paper a legal tender for debts. . . . Be the decision right or wrong, a point on which high authorities are still divided, the reversal by the highest Court in the land of its own previous decision may have tended to unsettle men’s reliance on the stability of the law; while the manner of the earlier reversal, following as it did on the creation of a new Judgeship, and the appointment of two Justices, both known to be in favor of the view which the majority of the Court had just disproved, disclosed a weak point in the constitution of the tribunal which may some day prove fatal to its usefulness.” *The American Commonwealth*, Vol. I, Part I, Chap. 24, p. 263. See Pamphlets of Mr. George Bancroft and Mr. R. C. McMurtrie, an article in “*The American Law Re-*

Prior to 1862 no statesman or jurist had asserted that Congress had, under the Constitution, the power of making anything but gold or silver coin a legal tender. The acts of Congress of 25th of February, 1862, 11th of July, 1862, and 3d of March, 1863,<sup>1</sup> declared that the notes issued thereunder should be "lawful money and a legal tender in payment of all debts, public and private, within the United States, except duties on imports, &c." Under these Acts it had been decided that neither taxes imposed by State authority<sup>2</sup> nor private obligations payable by their terms in gold or silver coin, were debts, within the terms of the Acts of Congress, dischargeable by payment in legal tender notes.<sup>3</sup>

The first case was that of *Bronson v. Rodes*, brought upon a writ of error from the Court of Appeals of the State of New York, and it appeared that the contract sued upon stipulated for the payment of gold and silver coin, lawful money of the United States, with interest also in coin. A tender had been made in United States notes to an amount nominally equal to the principal and interest of the debt, which was refused, and the question arose whether such tender was valid.

The case was elaborately argued by Mr. Townsend and Mr. Clarkson N. Potter, for the plaintiff in error, by Mr. Evarts, as Attorney-General of the United States, and Mr. Sherman S. Rogers, for the defendant in error, and the opin-

view," Vol. IV, p. 768, by Mr. Justice O. W. Holmes, and an article in "The Harvard Law Review," for May, 1887, Vol. I, p. 73, by Professor James B. Thayer, of the Harvard Law School.

<sup>1</sup> 12 Statutes, 345, 532, 709.

<sup>2</sup> *Lane County v. Oregon*, 7 Wallace, 71 (1868). See also *Hagar v. Reclamation District*, 111 U. S., 701 (1883).

<sup>3</sup> *Bronson v. Rodes*, 7 Wallace, 229, (1868); *Butler v. Horwitz*, *Ibid.*, 258 (1868); *Bronson v. Kimpton*, 8 Wallace 444 (1869).

ion was delivered by Chief Justice Chase, who, after a most elaborate review of the Coinage and Currency Acts, arrived at the conclusion that express contracts to pay coin dollars can only be satisfied by the payment of coin dollars, and that they are not "debts" which may be satisfied by the tender of United States notes. Justices Swayne and Davis concurred in separate opinions because of the language of the contracts. Mr. Justice Miller dissented.

A similar result was reached in the cases of *Butler v. Horwitz*<sup>1</sup> and *Bronson v. Kimpton*.<sup>2</sup> Mr. Justice Miller again dissented: he had no doubt that it was intended by the Acts of Congress to make the notes of the United States a legal tender for all private debts due, or which might become due, on contracts then in existence, without regard to the intent of the parties on that point.

In none of these cases was the Constitutionality of the Acts considered. That question arose in the later case of *Hepburn v. Griswold*,<sup>3</sup> argued by the same leading counsel at great length and with masterly ability, and the further question was mooted whether the Act of Congress in relation to legal tenders applied to debts contracted before, as well as after enactment. In the case at bar, the contract itself antedated the Act of Congress. The opinion was delivered by Chief Justice Chase, and was concurred in by Justices Nelson, Clifford, Grier and Field, and dissented from by Mr. Justice Miller for himself and Justices Swayne and Davis. After reaffirming the conclusions reached in *Bronson v. Rodes* and like cases, the Chief Justice said:

<sup>1</sup> 7 Wallace, 258 (1868). Contracts expressly payable in "gold and silver dollars," or in "specie," can only be satisfied by payment in coin. The Legal Tender Acts do not apply to them. *Trebilcock v. Wilson*, 12 Wallace, 687 (1872).

<sup>2</sup> 8 Wallace, 444 (1869).

<sup>3</sup> 8 Wallace, 603 (1869).



"We do not think ourselves at liberty, therefore, to say that Congress did not intend to make the notes authorized by it a legal tender in payment of debts contracted before the passage of the Act. We are thus brought to the question whether Congress has power to make notes issued under its authority a legal tender in payment of debts which, when contracted, were payable by law in gold or silver coin. . . . It has not been maintained in argument, nor indeed would any one, however slightly conversant with Constitutional law, think of maintaining that there is in the Constitution any express grant of legislative power to make any description of credit currency a legal tender in payment of debts. We must inquire, then, whether this can be done in the exercise of an implied power."

He then considered the language of Chief Justice Marshall in the case of *McCulloch v. State of Maryland*, as establishing a rule for determining whether a legislative enactment can be supported as an exercise of implied power, and after quoting the words: "*Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the spirit and letter of the Constitution, are Constitutional*," arrived at the conclusion that it must be taken as finally settled, so far as judicial decision could settle anything, that the words all laws 'necessary and proper' for carrying into execution powers expressly granted or vested, have in the Constitution a sense equivalent to that of the words, "*Laws, not absolutely necessary indeed, but appropriate, plainly adapted to Constitutional and legitimate ends; laws not prohibited but consistent with the letter and spirit of the Constitution; laws really calculated to effect objects entrusted to the Government*." The question then resolved itself into this: "Is the clause which makes United States notes a legal tender for debts contracted prior to its enactment, a law of the description stated in the rule?" The answer he did not con-

sider doubtful. The argument proved too much. It carried the doctrine of implied powers very far beyond any extent hitherto given to it. It asserted that whatever in any degree promoted an end within the scope of a general power, whether in the correct sense of the word "appropriate" or not, might be done in the exercise of an implied power. This proposition, he insisted, could not be maintained. In reply to the argument that this was a question for Congress to determine, he answered that the admission of a legislative power to determine finally what powers have a described relation as means to the execution of other powers plainly granted, and then to exercise absolutely and without liability to question, in cases involving private rights, the powers thus determined to have this relation, would completely change the nature of American government.

"It would convert the government which the people ordained as a government of limited powers, into a government of unlimited powers. It would confuse the boundaries which separate the Executive and Judicial from the Legislative authority. It would obliterate every criterion which this Court, speaking through the venerated Chief Justice in the case already cited, established for the determination of the question whether legislative acts are Constitutional or unconstitutional."

And by a most elaborate course of reasoning he held that although the Legislature had unrestricted choice among means appropriate, yet no power could be derived by implication from any express power to enact laws as means for carrying it into execution, unless such laws should come within the description of Marshall, and that the making of notes or bills of credit a legal tender in payment of pre-existing debts, was not a means appropriate or plainly adapted, or really calculated to carry into effect any express power vested in Congress; that it was inconsistent with the spirit of the Consti-

tution, and was in effect prohibited by the Constitution. Therefore, the Legal Tender Acts, so far as they applied to debts contracted before their passage, were unconstitutional and unwarranted.

In his dissenting opinion, Mr. Justice Miller divided the provisions of the Constitution relating to the function of legislation, into those which conferred legislative powers on Congress; those which prohibited the exercise of legislative powers by Congress; and those which prohibited the States from exercising certain legislative powers. He subdivided the first into positive and auxiliary powers, or, as more commonly called, the express and the implied powers. As instances of the former class, he cited the power to borrow money, to raise and support armies, to coin money, and to regulate the value thereof. The implied or auxiliary powers he contended, were founded largely on the general provision which closed the enumeration of powers granted in express terms, by the declaration that Congress should have power also to make all laws that would be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the Government of the United States, or in any department or officer thereof. He pointed out that although the Constitution prohibited any State from coining money, emitting bills of credit, or making anything else but gold and silver coin a payment of debts, yet no such prohibition was placed upon the power of Congress on this subject, while on the contrary, Congress was expressly authorized to coin money and to regulate the value thereof, and of all foreign coin, and to punish the counterfeiting of such coin, and of the securities of the United States. He insisted that this latter clause, when fairly construed, conferred the power to make the securities of the United States a legal tender in

payment of debts. In considering the scope of the words "necessary and proper," he declared that the necessity need not be absolute, nor need the adaptation of the means to the end be unquestioned. On the contrary, as Chief Justice Marshall had said, "a thing may be necessary, very necessary, absolutely or indispensably necessary," and that the word, like all others, was viewed in various senses, and in its construction, the subject, context, and the intention of the persons using them, were all to be taken into view.

He then pointed out that the power to declare war, to suppress insurrection, to raise and support armies, to provide and maintain a navy, to borrow money on the credit of the United States, to pay the debts of the Union, and to provide for the common defence and general welfare, were all express powers distinctly and specifically granted in separate clauses of the Constitution, and that when Congress was called on to devise some new means of borrowing money on the credit of the United States for the purpose of meeting the peril incident to a state of civil war that the Legal Tender Acts furnished instantly a means of paying the soldiers in the field, and of filling the coffers of the commissary and quartermaster; that they further furnished a medium for the payment of private debts as well as public, at a time when gold was being rapidly withdrawn from circulation, and the State bank currency was becoming worthless; that they furnished the means to the capitalist of buying the bonds of the Government, that they stimulated trade, revived the drooping energies of the country, and restored confidence to the public mind. He therefore reached the conclusion that not only did the necessity in the Constitutional sense of the term exist, but that the means adopted bore to the necessity a proper and Constitutional relation. He also held that where

there was a choice of means, the selection rested with Congress, and not with the Court, and that if the Act to be considered was in any sense essential to the execution of an acknowledged power, the degree of that necessity was for the Legislature, and not for the Court to determine. He therefore expressed the opinion that Congress had acted within the scope of its authority, and that he must hold the law to be Constitutional, and dissent from the opinion of the majority of the Court. In this conclusion Mr. Justice Swayne and Mr. Justice Davis concurred. Several other cases, in one of which Mr. Benjamin R. Curtis appeared as counsel, depending upon the same question, were ruled in the manner indicated by the judgment of the majority of the Court.<sup>1</sup>

The utmost excitement prevailed in the public mind immediately after the announcement of the decision, and it was not long before it became generally understood that an effort would be made to secure a reconsideration of the judgment.<sup>2</sup>

<sup>1</sup> Broderick's Excr. v. Magraw, 8 Wallace, 639 (1869); Willard v. Tayloe, 8 Wallace, 557 (1869). See also Thompson v. Riggs, 5 Wallace, 663 (1866).

<sup>2</sup> A charge has been made that the Supreme Court was packed for the purpose, but examination of a few simple facts and dates shows it to be without foundation, except so far as political prejudice and dissatisfaction with the final result may unite to pervert the evidence. The charge is based upon the common fallacy: *post hoc, ergo propter hoc*.

The case of Hepburn v. Griswold had been argued for the first time at the December term of 1867 by private counsel. Subsequently, Mr. Stanbery, then Attorney-General of the United States, suggesting the great public importance of the question, secured a re-argument, and the case was again argued in 1868 by Mr. B. R. Curtis, Mr. Evarts and Mr. Potter. Four other cases involving similar questions were also heard. While the question was still undecided, and ten months before the decision was announced, Congress had passed an Act on the 10th of April, 1869, to take effect on the first Monday of the following December, authorizing the appointment of an additional Justice of the Supreme Court, and at the same time the Act of 23d July, 1866, reducing the number of Associate Justices from nine to six by not filling vacancies as they should occur, was repealed. At this time the deaths of Justices Catron and Wayne had reduced the number of Associates to seven. The

An Act of Congress had been passed on the 10th of April, 1869, to take effect on the first Monday of the succeeding December, authorizing the appointment of an additional Justice of the Supreme Court. A vacancy also existed through the resignation of Mr. Justice Grier. The decision in

effect of the Act of 1869 was to make the Court consist of a Chief Justice and eight Associates. On the 15th December, 1869, two weeks after the new law went into effect and nearly two months before the decision in *Hepburn v. Griswold* was announced, Mr. Justice Grier resigned, his resignation to take effect in the following February. Mr. Stanton was commissioned as his successor on the 20th of December, 1869, but died four days afterwards. Several ineffectual efforts were made to fill his place, but the nominations failed of confirmation. On the 7th February, 1870, the decision was announced, and at this time, therefore, there were two existing vacancies in the Court, one under the Act of 1869, the other through the resignation of Mr. Justice Grier. *On the very day of the decision*—7th February, 1870—the names of Joseph P. Bradley and William Strong were sent to the Senate in that order without specifying to which vacancy either was to be assigned. It is preposterous to assert that before the decision of the Court was an hour old and its effects could be considered, President Grant had matured a well-digested plan, with carefully selected instruments, to accomplish a reversal of a solemn judgment—an event unheard of and unparalleled at that time—by filling vacancies created months before the decision was known, and which would have been filled by others than those finally chosen had not death and disagreement between the Senate and the President deprived the latter of his original choice.

As to the well-known views of Judge Strong, who had been Lincoln's choice for Chief Justice, and who had decided the cases of *Shollenberger v. Brinton*, 52 Pa. St., 9, in 1866, sustaining the legal tender features of the Acts of Congress, it is to be remarked that the majority of the Judges of the Supreme Courts of fifteen States in the Union had pronounced similar views, and in only two States—New Jersey and Kentucky—had final decisions been rendered adverse to the validity of the legal tender provisions of the Acts, *Martin v. Martin*, 20 N. J. Eq., 421 (1870); *Griswold v. Hepburn*, 2 Duvall, (Ky.) 20 (1865). The State decisions affirming the power were *George v. Concord*, 45 N. H., 434 (1864); *Carpenter v. Bank*, 39 Vt., 46 (1866); *Essex Co. v. Pacific Mills*, 14 Allen (Mass.) 389 (1867); *Metropolitan Bank v. Van Dyck*, 27 N. Y., 400 (1863); *Legal Tender Cases*, 52 Pa. St., 9 (1866); *Thayer v. Hedges*, 23 Ind., 141 (1864); *Van Husen v. Kanouse*, 13 Mich., 303 (1865); *Breitenbach v. Turner*, 18 Wis., 140 (1864); *O'Neil v. McKewn*, 1 S. C. 147 (1869); *Wills v. Allison*, 4 Heiskell (Tenn.) 385 (1871); *Breen v. Dewey*, 16 Minn., 136 (1870); *Hintrager v. Bates*, 18 Iowa, 174 (1864); *Riddlesbarger v. McDaniel*, 38 Mo., 138 (1866); *Verges v. Giboney*, *Ibid.*, 458 (1866); *Cox v. Smith*, 1 Nev. 161 (1865); *Lick v. Faulkner*, 25 Cal., 404 (1864).

*Hepburn v. Griswold* had been pronounced upon the 7th of February, 1870. On the same day the names of Mr. Bradley and Mr. Strong were sent to the Senate. On the 14th of March of that year Mr. Justice Strong became a member of the Court, having been commissioned on the 18th of February, and on the 21st of March Mr. Justice Bradley was also commissioned. Shortly after this a motion was made by the Attorney-General of the United States, that two cases, those of *Lathams v. United States*, and *Demming v. United States*, brought by appeal from the Court of Claims, should be set down for argument, and that the legal tender question might be reconsidered. These cases were subsequently withdrawn from the record, but the question again arose in *Knox v. Lee* and *Parker v. Davis*,<sup>1</sup> and the whole question was again opened for the consideration of the Court, and argued with the utmost elaboration. The former decision in *Hepburn v. Griswold* was distinctly overruled, and it was held that the Legal Tender Acts were Constitutional and valid, both as to contracts made before and since their passage. The opinion of the Court was delivered by Mr. Justice Strong, who pointed out that if the Acts were held to be invalid as applicable to debts incurred or transactions which had taken place since their enactment, the decision would cause throughout the country great business derangement, wide-spread distress, and the rankest injustice. Debts which had been contracted since February 25th, 1862, constituted by far the greatest portion of the existing indebtedness of the country; they had been contracted in view of the Acts of Congress declaring Treasury notes a legal tender, and, in reliance upon that declaration, men had bought and sold, borrowed and lent, and assumed every variety of obligations, contemplating that payment might

<sup>1</sup> 12 Wallace, 457 (1870).

be made with such notes. If by the decision it was established that these debts and obligations could be discharged only by gold coin; if, contrary to the expectations of all parties to these contracts, legal tender notes were rendered valueless, the Government would at once become an instrument of the grossest injustice, and all debtors would be loaded with an obligation which it was never contemplated they should assume; a large percentage would be added to every debt, and such must become the demand for gold to satisfy contracts, that ruinous sacrifices, general distress and bankruptcy might be expected.

“The consequences of which we have spoken, serious as they are, must be expected if there is a clear incompatibility between the Constitution and the Legal Tender Acts; but we are unwilling to precipitate them upon the country unless such an incompatibility plainly appears. A decent respect for a co-ordinate branch of the Government demands that the Judiciary should presume, until the contrary is clearly shown, that there has been no transgression of power by Congress—all the members of which act under the obligation of an oath of fidelity to the Constitution.”

He then entered upon a most elaborate investigation of the nature and extent of the powers conferred by the Constitution upon Congress, keeping in view the objects for which those powers were granted, and deduced, as a necessary inference from the war powers, the conclusion that the provision which made Treasury notes a legal tender for the payment of all debts, other than those expressly excepted, was not an inappropriate means for carrying into execution the legitimate powers of the Government, nor was it forbidden by the letter or spirit of the Constitution. He said:

“In so holding, we overrule so much of what was decided in *Hepburn v. Griswold* as ruled the acts unwarranted by the Constitution so



far as they apply to contracts made before their enactment. That case was decided by a divided Court, and by a Court having a less number of Judges than the law then in existence provided this Court shall have. These cases have been heard before a full Court, and they have received our most careful consideration. The questions involved are Constitutional questions of the most vital importance to the Government and to the public at large. We have been in the habit of treating cases involving a consideration of Constitutional power differently from those which concern merely private rights. We are not accustomed to hear them in the absence of a full Court, if it can be avoided. Even in cases involving only private rights, if convinced we had made a mistake, we would hear another argument and correct our error, and it is no unprecedented thing in Courts of last resort, both in this country and England, to overrule decisions previously made. We agree this should not be done inconsiderately, but in a case of such far-reaching consequences as the present, thoroughly convinced as we are that Congress has not transgressed its powers, we regard it our duty so to decide and affirm both these judgments."

A most vigorous concurring opinion was read by Mr. Justice Bradley, in which he stated that he regarded the question of power as so important to the stability of the Government, that he could not acquiesce in the decision of *Hepburn v. Griswold*.

"I cannot consent," said he, "that the Government should be deprived of one of its just powers by a decision made at the time and under the circumstances in which that decision was made. On a question relating to the power of the Government where I am perfectly satisfied that it has the power, I can never consent to abide by a decision denying it, unless made with reasonable unanimity, and acquiesced in by the country. Where the decision is recent, and is only made by a bare majority of the Court, and during a time of public excitement on the subject, when the question has largely entered into the political discussions of the day, I consider it our right and duty to subject it to a further examination, if a majority of the Court are dissatisfied with the former decision. And in this case, with all deference and respect for the former judgment

of the Court, I am so fully convinced that it was erroneous and prejudicial to the rights, interests and safety of the General Government that I for one have no hesitation in reviewing<sup>a</sup> and overruling it. It should be remembered that this Court at the very term in which, and within a few weeks after the decision in *Hepburn v. Griswold* was delivered, when the vacancies on the bench were filled, determined to hear the question re-argued. This fact must necessarily have had the effect of apprising the country that the decision was not fully acquiesced in, and of obviating any injurious consequences to the business of the country by its reversal."

Chief Justice Chase pronounced a most elaborate dissenting opinion, in which he again traversed the ground covered by his opinion in *Hepburn v. Griswold*, and insisted that the error of the minority Judges in that case was in urging as a justification of legal tenders considerations pertinent to the issue of United States notes.

"The real question," said he, "is, was the making (treasury notes) a legal tender a necessary means to the execution of the power to borrow money. If the notes would circulate as well without as with this quality, it is idle to urge the plea of such necessity; but the circulation of the notes was amply provided for by making them receivable for all National taxes, all dues to the United States, and all loans. This was the provision relied upon for the purpose by the Secretary (of the Treasury) when the Bill was first prepared, and his reflections since have convinced him that it was sufficient. Nobody could pay a tax, or any debt, or buy a bond without using these notes. As the notes, not being immediately redeemable, would undoubtedly be cheaper than coin, they would be preferred by debtors and purchasers. They would thus, by the universal law of trade, pass into general circulation. As long as they were maintained by the Government at or near the par value of specie, they would be accepted in payment of all dues, private as well as public. . . . Now does making the notes a legal tender increase their value? It is said that it does, by giving them a new use. The best political economists say that it does not. When the Government compels the people to receive its notes, it virtually declares that it does not expect them to be received without compulsion. It practically represents itself insolvent.

This certainly does not improve the value of its notes. It is an element of depreciation. . . . We have no hesitation, therefore, in declaring our conviction that the making of these notes a legal tender was not a necessary or proper means to the carrying on of the war, or to the exercise of any express power of the Government."

He insisted further that the law violated an express provision of the Constitution, and the spirit, if not the letter, of the whole instrument; that, inasmuch as the Fifth Amendment provided that no person should be deprived of life, liberty or property without compensation or due process of law, the Acts, by operating directly upon the relations of debtor and creditor, violated that fundamental principle of all just legislation, that the Legislature should not take the property of A and give it to B. "It says that B, who has purchased a farm of A, for a certain price, may keep the farm without paying for it, if he will only tender certain notes which may bear some proportion to the price, or be even worthless. It seems to us that this is a manifest violation of this clause of the Constitution." He also insisted that the acts impaired the obligation of contracts, and closed his opinion with these words:

"The present majority of the Court say that legal tender notes 'have become the universal measure of values,' and they hold that the legislation of Congress substituting such measures for coin by making the notes a legal tender in payment, is warranted by the Constitution. But if the plain sense of words, if the contemporaneous exposition of parties, if common consent in understanding, if the opinions of Courts avail anything in determining the meaning of the Constitution, it seems impossible to doubt that the power to coin money is a power to establish a uniform standard of value, and that no other power to establish such a standard by making notes a legal tender is conferred upon Congress by the Constitution."

Mr. Justice Clifford, in his dissenting opinion, entered into a most elaborate examination of the meaning of the word "money" in the Constitutional sense, and reviewed all the Coinage Acts in detail, entering most exhaustively into a consideration of economic and financial views, and citing from the writings of famous publicists, both domestic and foreign.

Mr. Justice Field also dissented in an able opinion, asserting that it was plain that the policy of maintaining a fixed and uniform standard could not be carried out, and that a fixed and uniform metallic standard of value throughout the United States could not be maintained so long as any other standard was adopted which of itself had no intrinsic value and was forever fluctuating and uncertain. He admitted that the measure, the validity of which was called in question, was passed in the midst of a gigantic rebellion, when even the bravest heart sometimes doubted the safety of the Republic, and that the patriotic men who adopted it did so under the conviction that it would increase the ability of the Government to obtain funds and supplies, and thus advance the National cause; but he declared that, sitting as a judicial officer, and bound to compare every law enacted by Congress with the greater law enacted by the people, and being unable to reconcile the measure in question with that fundamental law, he could not hesitate to pronounce it, in his judgment, unconstitutional and void.

"In the discussions which have attended this subject of legal tender," said he, "there has been at times what seemed to me to be a covert intimation that opposition to the measure in question was the expression of a spirit not altogether favorable to the cause in the interest of which that measure was adopted. All such intimations I repel with all the energy I can express. I do not yield to any one in honoring

and reverencing the noble and patriotic men who were in the councils of the Nation during the terrible struggle with the Rebellion. To them belong the greatest of all glories in our history,—that of having saved the Union, and that of having emancipated a race. For these results they will be remembered and honored so long as the English language is spoken or read among men. But I do not admit that a blind approval of every measure which they may have thought essential to put down the Rebellion is any evidence of loyalty to the country. The only loyalty which I can admit consists in obedience to the Constitution and laws made in pursuance of it. It is only by obedience that affection and reverence can be shown to a superior having a right to command. So thought our great Master when he said to his disciples: 'If ye love me, keep my commandments.'''<sup>1</sup>

We have dwelt at length upon the features of this great judicial debate, not only because of its intrinsic interest and the fundamental character of the question involved, but because it displays in the most convincing manner the talents of the great jurists who participated in it, and vindicates their title to be regarded as among the ablest of the many distinguished men who have illustrated our national jurisprudence.

Another question of profound and lasting importance, involving the construction of the Thirteenth, Fourteenth and Fifteenth Amendments, arose in the famous *Slaughter House Cases*.<sup>2</sup> They grew out of an Act of the Legislature of Louisiana, passed since she had been recognized as a State of the Union, after the close of the Civil War. The Slaughter House Company was a corporation created by statute, possessing the exclusive privilege of establishing and maintaining stock-yards and landing-places and slaughter-houses for the city of New Orleans, in which all stock must be landed,

<sup>1</sup> See also *Dooly v. Smith*, 13 Wallace, 604 (1871). Mr. Justice Field's dissenting opinion in *Bigler v. Waller*, 14 Wallace, 297 (1871). *Railroad Co. v. Johnson*, 15 Wallace, 195 (1872).

<sup>2</sup> 16 Wallace, 36 (1872).

and all animals intended for food must be slaughtered. Regulations for the maintenance of the slaughter house were fully and completely detailed, and the corporation was required to provide all the conveniences necessary for that purpose, and restrictions upon the price charged therefor were stated. The butchers of the city considered this monopoly an invasion of their personal rights, particularly under the Amendments, and brought suit to restrain the exercise of this authority by the Slaughter House Company. The case finally reached the Supreme Court of the United States, and was twice argued by Mr. John A. Campbell, formerly an Associate Justice of the Supreme Court, in a manner which excited the utmost admiration for the extraordinary ability, learning, ingenuity and eloquence displayed. On the other side appeared Senator Carpenter, of Wisconsin. The opinion of the Court was delivered by Mr. Justice Miller, putting a much more limited interpretation upon the Amendments, and particularly the Thirteenth, than had been expected. It was asserted that an examination of the history of the causes which led to the adoption of the Amendments showed that their main purpose was the freedom of the African race, the security and perpetuation of that freedom, and their protection from the oppressions of the white men who had formerly held them in slavery, and that while the Thirteenth Amendment was intended primarily to abolish African slavery, it equally forbade Mexican peonage or the Chinese Coolie trade, when they amounted to slavery or involuntary servitude; that the use of the word "servitude" was intended to prevent all forms of involuntary servitude of whatever class or name; that the first clause of the Fourteenth Amendment was primarily intended to confer citizenship on the Negro race, and secondly to give a definition of citizenship of the United

States and citizenship of the State; that it recognized a distinction between them, and that the second clause protected from the hostile legislation of the States the privileges and immunities of the citizens of the United States, as distinguished from the privileges and immunities of the citizens of the States. From this reasoning the conclusion was somewhat unexpected. It was held that the law in question was a police regulation for the health and comfort of the people entirely within the power of the State Legislatures, and unaffected either by the Constitution of the United States previous to the adoption of the Amendments, or since.

From this opinion Mr. Justice Field and Mr. Justice Bradley dissented in the most energetic terms, holding that the Amendments were intended for whites as well as blacks; that they conferred upon all alike, if born in the United States or naturalized, citizenship of the United States, making that the primary status of citizenship, and citizenship of the States only secondary, depending on mere residence; that the privileges and immunities of citizens, which States were forbidden to abridge, were not merely those arising out of the Constitution itself, such as voting for Representatives, etc., but all fundamental rights of persons or property usually regarded as secured in all free countries, as evinced by the subsequent provision against depriving any person of life, liberty or property without due process of law, or denying to any person the equal protection of the laws; that amongst these privileges and immunities was the right of labor, the pursuit of happiness, and following any of the ordinary employments or callings of life, subject to reasonable regulations; that the grant of a monopoly of one of these employments to a favored few, to the exclusion of all the rest of the community, was an abridgement of the rights of the latter, and an abuse of legis-

lative authority; and that it was a mere pretence to call the law in question a police regulation, as it was well known to be one of those pernicious acts of fraud and oppression by which irresponsible legislatures robbed and plundered the Southern people at the close of the Civil War.

The decision of the majority was severely criticised, and in its defence Mr. Justice Miller, who pronounced the opinion, and who always referred to it in terms of pride, has said:<sup>1</sup>

“Although this decision did not meet the approval of four out of nine of the Judges, on some points on which it rested, yet public sentiment, as found in the Press, and in the universal acquiescence with which it was received, accepted it with great unanimity, and although there were intimations that in the legislative branches of the Government the opinion would be reviewed and criticised unfavorably, yet no such thing has occurred in the fifteen years which have elapsed since it was delivered, and while the question of the construction of these Amendments, and particularly the Fourteenth, has often been before the Supreme Court of the United States, no attempt to overrule or disregard this elementary decision of the effect of the three new Constitutional Amendments upon the relations of the State Governments to the Federal Government has been made; and it may be considered now as settled that, with the exception of the specific provisions in them for the protection of the personal rights of the citizens and people of the United States, and the necessary restrictions upon the States for that purpose, with the addition of the powers of the General Government to enforce those provisions, no substantial change has been made. The necessity of the great powers conceded by the Constitution originally to the Federal Government, and the equal necessity of the autonomy of the States, and their power to regulate their domestic affairs, remain as the great features of our complex form of government.”

The decision stands as a bulwark of State authority, the

<sup>1</sup> See Address delivered before the Alumni of the Law Department of Michigan on the “Supreme Court of the United States” at the Semi-Centennial Celebration of the University, June 29, 1887.







*W. Strong*

most important and substantial of those erected since the days of Taney.<sup>1</sup>

During the period of the decisions which have been reviewed in this chapter, several changes took place upon the bench, which it is proper to notice. William Strong of Pennsylvania, was commissioned as an Associate Justice upon the 18th of February, 1870. In writing to President Grant he said, "You have done me great honor. I shall ever gratefully remember your kindness. A seat in the Supreme Court would satisfy all my ambition, except ambition to discharge its duties well."

His grandfather, Adonijah Strong, was a lawyer, and served in the Revolutionary Army as Commissary General. His father, the Rev. William L. Strong, was a Congregational minister. The future Associate Justice was born at Somers, Tolland County, Connecticut, upon the 6th of May, 1808, and was the eldest of eleven children. He was educated at the Plainfield Academy, graduated from Yale in 1828, and while teaching school in Burlington, N. J., studied law under

<sup>1</sup> Mr. John S. Wise, of Virginia, has expressed himself in the following glowing terms: "I said that we owed more to the American lawyer than to the American soldier, and I repeat it; for not all the victories of Grant, or all the marches of Sherman, have by brute force done as much to bulwark this people with the inestimable blessings of Constitutional liberty as that one decision of the Supreme Court in the Slaughter House Cases, declaring what of their ancient liberties remained. That decision, worthy to live through all time for its masterly exposition of what the war did and did not accomplish, did more than all the battles of the Union to bring order out of chaos. . . . When war had ceased, when blood was stanchied, when the victor stood above his vanquished foe with drawn sword, the Supreme Court of this Nation, when it spoke in the great decision of the Slaughter House Cases, planted its foot and said, 'This victory is not an annihilation of State Sovereignty, but a just interpretation of Federal power.'" Speech of Mr. Wise in reply to the toast "The American Lawyer," at the Breakfast to the Justices of the Supreme Court of the United States by the Bar of Philadelphia, September 15th, 1887.

Garrett D. Wall as a preceptor, completing his legal studies by a six months' course in the Yale Law School. Having determined to practice law in Pennsylvania, he was admitted to the Bar in that State in 1832, and settled at Reading, acquiring the German language, which he spoke with fluency, and soon took high rank as a lawyer. In 1846 he became a candidate for Congress, and was twice elected on the Democratic ticket, serving from 1847 to 1851. During his second term, he was appointed chairman of the Committee on Elections. Declining a third nomination, he retired from active participation in politics, but upon the outbreak of the Civil War, though then occupying high judicial station, gave all his support and influence in aid of the Government. In 1857 he was elected an Associate Justice of the Supreme Court of Pennsylvania, and filled that high office for the term of eleven years. Attaining distinguished prominence as an able and upright judge, his opinions on all questions of law, but particularly those affecting real estate, the interpretation of wills, and the duties and liabilities of trustees, are highly valued. Clear, precise, and vigorous in style, accurate in his application of principles and of abundant and varied learning, he ranked among the foremost jurists of the State.

In 1868 he resigned his seat upon the bench, and opened an office in Philadelphia, acquiring almost immediately a large and lucrative practice. Two years later, he was appointed an Associate Justice of the Supreme Court. It is not generally known that President Lincoln had selected him for the vacancy created by the death of Chief Justice Taney, but was obliged to forego his personal preferences to parry the Presidential aspirations of Mr. Chase.

Careful in the investigation of facts, discriminating nicely in the application of principles, of sound judgment as a critic,

candid in consultation, making suggestions which were always worthy of attention, but never gave offence, Mr. Justice Strong became a leader in the highest tribunal of the Nation and a firm supporter of the dignity and authority of the Court. Of his opinions, those on the Captured and Abandoned Property Act,<sup>1</sup> in the Legal Tender cases,<sup>2</sup> the State Freight Tax case,<sup>3</sup> the Confiscation cases,<sup>4</sup> the Civil Rights cases,<sup>5</sup> and particularly the case of *Tennessee v. Davis*,<sup>6</sup> exhibit, in a high degree, remarkable power of analysis, logical arrangement of matter, and eloquence of statement. He owed much, he was often heard to say, to a familiar acquaintance with the works of John Locke. Upon certain questions his convictions were so strong, stubborn in fact, as to amount to what his critics pronounced to be prejudices, while his friends admired the boldness of his views, and the tenacity with which he adhered to them. He was a member of the Electoral Commission, and his opinion sustained that of the majority of the Court, holding that Congress had no power to canvass a State election for Presidential Electors.

Under the provisions of the Revised Statutes, he resigned the office of Associate Justice in 1880, in the full maturity of his great powers "with his natural force unabated." The Bar of the Supreme Court expressed their cordial recognition of his profound learning, ripe wisdom, sincere anxiety to do justice, rigid impartiality, absolute independence, and unfailing courtesy and patience, while his associates on the bench bore willing witness to his purity of character as a man, and his eminent ability as a Judge.

<sup>1</sup> *Bigelow v. Forrest*, 9 Wallace 339 (1869).

<sup>2</sup> *Knox v. Lee*, *Parker v. Davis*, 12 Wallace, 457 (1870).

<sup>3</sup> 15 Wallace, 232 (1872).

<sup>4</sup> 7 Wallace, 454 (1868).

<sup>5</sup> 109 U. S., 3 (1883).

<sup>6</sup> 100 U. S., 257 (1879).

Besides his official and professional labors, he has taken an active part in the councils of the Presbyterian Church, of which he is a distinguished member. For many years he was President of the American Tract Society and the American Sunday School Union, and a warm supporter of benevolent enterprises. He has delivered many public addresses, and contributed to magazines and reviews. In 1875 he pronounced before the Philadelphia Bar and the American Philosophical Society, of which he was a member, a discourse upon the "Life and Character of Horace Binney," and in 1879 delivered before the Law Department of the University of Pennsylvania, an address upon the "Growth and Modifications of Private Civil Law." He delivered also a course of lectures to the professors and students of the Union Theological Seminary of New York, upon the "Relations of Civil Law to Church Polity," and for several years, lectures in the Law Department of the Columbian University at Washington. In 1881 he contributed to the North American Review an important article upon "The Needs of the Supreme Court," in which he discussed the various plans suggested for its relief from an undue pressure and accumulation of business, arguing in favor of that which, in its main features, has been recently adopted by Congress. Lafayette College in 1867, and Yale and Princeton in 1870 conferred upon him the degree of LL.D.

Joseph P. Bradley was born at Berne, Albany County, New York, on the 14th of March, 1813. He is the sixth in descent from Francis Bradley, an English emigrant who came to this country in 1645, and settled in Fairfield, Connecticut, in 1660, his descendants removing, in 1791, to Berne. His great-grandfather fought for American Independence, and his grandfather was one of the heroes of the war of 1812, both



*The Portrait  
of J. P. Bradley  
1889*

*Joseph P. Bradley*  
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living to a great age. His father, Philo Bradley, though brought up to farm work, was fond of books and reading, and occasionally taught school. His mother, Mercy Gardner, came of Rhode Island stock, and displayed a genius for mathematical calculations. They were married at seventeen years of age, and Joseph was the eldest of eleven children. His early years were spent most industriously upon the farm, which produced all articles of food and clothing—sugar from the forest, flax from the field, and wool from the flock. Later in life the Judge has been heard to say: "I still preserve the family spinning-wheel and loom as my best title to hereditary respectability." He attended the country school for four months in each year, his favorite study being mathematics, in which, though almost self-taught, he became so proficient as to be able, while yet a mere boy, to practice surveying. At the age of sixteen he became a teacher, and pursued this vocation until his twenty-first year. His general reading was extensive, and his thirst for knowledge slakeless. He enjoyed the advantage of being prepared by the village clergyman, and entered Rutgers College, New Jersey, in September, 1833, from which he graduated with high honors three years later with such distinguished classmates as the late Secretary of State Frelinghuysen, Cortlandt Parker and Governor W. A. Newell. At one time he had formed plans for entering the ministry, but these were abandoned, and he became the principal of a classical school, at the same time pursuing the study of the law in the office of Archer Gifford, Esq., of Newark. During this time he was a frequent contributor to the newspapers of articles upon topics of current interest, and in after life he exerted his talents for speaking and writing, delivering many addresses upon historical, political and scientific subjects before colleges and learned bodies. He also con-

tributed valuable articles to encyclopedias, and carried on an extensive correspondence with men of science.

In 1840 he was admitted to the bar, and for thirty years was engaged in active practice, conducting the most difficult and important cases in both the Federal and State courts, embracing land, commercial, patent and corporation law, as well as questions involving life and liberty. His advice was frequently sought in business transactions. For many years he was actuary of a leading life insurance company, and a director in a savings fund; also a director, as well as the leading counsel of the great railroad corporations of his State.

At the December Term, 1860, he argued his first case in the Supreme Court of the United States, contending with success that unless Congress has passed an act to the contrary, a State may authorize a drawbridge to be constructed over a navigable river, a point frequently affirmed since then without dissent.

At the outbreak of the Rebellion he devoted his eloquent voice and pen to the cause of the Union, neglecting the calls of business and the engagements of the court-room to summon the people of his State to rise, not as partisans, but as Americans "in support of the Constitution and the Government until its authority is vindicated forever." He also exerted himself most strenuously in aiding the railroads, his clients, in forwarding armies and munitions of war to the scene of conflict. Although inclining but little towards political life, originally a Whig and later a Republican, he accepted a nomination for Congress in 1862, but without hope of election, as the district was largely opposed to him in politics. In 1868 he headed the State Electoral ticket for Grant.

In 1870 two vacancies existed in the Supreme Court of the United States, which were filled as we have already stated

by the appointment and confirmation of Mr. Bradley and Mr. Strong. The commission of Mr. Justice Bradley was dated the 21st of March, 1870. He was assigned to the Fifth Circuit, which embraced the Gulf States from Georgia to Texas. For several years more Federal questions arose in this Circuit than in any other, and in settling them, Judge Bradley rendered many important decisions. During this time he added much to his already considerable knowledge of the Civil law, displaying in his opinions, most notably in the Mormon Church case, the richness, variety and solidity of his attainments. Ten years later, upon the resignation of his associate, Mr. Justice Strong, he was assigned to the Third Circuit, to which he has ever since remained attached.

It may be said of his judicial work that in generalizing broadly, and yet analyzing minutely, no small or important fact or reason has escaped his vigilance, nor have details been suffered to obscure the principles of justice. His opinions are marked by great breadth of learning, which enables him to draw from the laws of nations of Continental Europe those fundamental principles of right which are applicable to all systems of government, while he carefully abstains from overstepping the limits of Constitutional power. His views upon maritime law, and cases requiring statutory or Constitutional construction, as well as those relating to Civil rights and *habeas corpus*, are valued as substantial contributions to the science of jurisprudence. His opinions in patent causes are particularly important. His style is powerful and accurate, yet smooth and flowing.

In 1877 he served as a member of the Electoral Commission, sustaining the conclusions of the majority, taking his position after careful study of the facts, and supporting it by elaborate argument. As a scholar, his attainments cover an

unusually wide range of the domain of human knowledge. Of a high order of ability and unflagging application, zealous in his devotion to truth, he has become equally strong and learned in several of the great divisions of scholarship, remaining throughout life a devotee to mathematics and the natural sciences, and amusing himself by calculating eclipses, studying the transit of Venus, and making calendars for determining on sight the day of the week of any date for forty centuries, and the time of new moon in any month of any century past or future, and other abstruse calculations. His linguistic acquirements are also considerable, but he has made all branches of learning tributary to the law, and has been styled by a competent critic "an old-fashioned jurist." The degree of LL.D. was conferred upon him in 1859 by Lafayette College. In 1865 he made an extended visit to Europe, and a short excursion there in 1869.<sup>1</sup>

Upon the 28th of November, 1872, Mr. Justice Nelson, at the age of eighty years, retired from his position in the Supreme Court to his home at Cooperstown. Ward Hunt, of New York, was commissioned in his place upon the 11th of December, of that year.

Mr. Hunt was born in Utica on the 14th of June, 1810, and was the son of Montgomery Hunt, long the cashier of the old Bank of Utica, and a much respected citizen. After a preparatory course at the Oxford and Geneva Academies, at both of which he had Horatio Seymour as a classmate, he entered Union College and graduated in 1828, with high honors. He attended the law school at Litchfield, Conn., then under the direction of James Gould, a distinguished judge

<sup>1</sup> A list of the most important opinions delivered by Mr. Justice Bradley is to be found in the biographical sketch relating to him, published in the Indexed Digest of the Lawyers' Co-operative Company.



Ward Hunt



and the author of a Treatise on the Principles of Pleading. Returning to his native town he entered the office of Hiram Denio, a lawyer of high rank, and afterwards one of the most distinguished of jurists. Mr. Hunt was admitted to the bar in 1831, but breaking down in health, spent the winter in New Orleans. Upon his return he formed a copartnership with his preceptor, and soon won his way to a lucrative practice and the confidence of numerous clients. In 1839 he served as a member of the New York Legislature, but took little active part in politics, devoting himself chiefly to jurisprudence. In 1844 he was elected Mayor of his native town and shortly afterwards became a candidate for the Supreme Court of the State, but failed because of the hostility of the Irish voters, aroused by his successful defence of a policeman charged with the murder of an Irishman. In early life he was a Jacksonian Democrat, and as such had been elected to the Assembly, but became a Free Soiler and an active partisan of Mr. Van Buren in his canvass for re-election to the Presidency. In 1853 he again failed of election to the Supreme Court. Upon the outbreak of the Civil War he joined the Republican Party and gave it zealous support. In 1865 he became a candidate for the Court of Appeals and was elected by an overwhelming majority. A few years after, he became, under the amended Constitution of the State, a member of the Commission of Appeals, a position which he held at the time of his promotion to the highest Court of the Union.

It has been said of him that while neither a Marshall in intellect, nor a Kent in legal knowledge, he had great judicial ability. Shortly after taking his seat he failed in health and for several years was unable to discharge the duties of his position, but by a special act of Congress was enabled to retire

from service upon full salary. His farewell to the bench and the letter addressed to him by his colleagues are touching and pathetic incidents in the history of the Court, his written reply indicating both in spelling and in grammar, the serious inroads upon his mental faculties by disease.

But few opinions were delivered by him, but the chief of these, *Upton v. Tribilcock*,<sup>1</sup> in which it was held that the original holder of stock in a corporation was liable for unpaid instalments without an express promise, the capital stock of a corporation being a trust fund for the benefit of its creditors, and *Reckendorfer v. Faber*,<sup>2</sup> in which he elaborately reviewed the cases relating to patents, are indicative of his care and accuracy in the statement of facts and the application of legal principles.

<sup>1</sup>91 U. S., 45 (1875).

<sup>2</sup>92 U. S., 347 (1875).



## CHAPTER XIX.

SEVENTH EPOCH CONTINUED: 1874 TO 1888: DEATH OF CHIEF JUSTICE CHASE: APPOINTMENT OF MORRISON R. WAITE AS HIS SUCCESSOR: GENERAL CHARACTER OF CASES CONSIDERED AT THIS TIME: SKETCHES OF CHIEF JUSTICE WAITE AND ASSOCIATE JUSTICES HARLAN, WOODS AND MATTHEWS: LEADING CASES IN CONSTRUCTION OF THE THIRTEENTH, FOURTEENTH AND FIFTEENTH AMENDMENTS: THE RIGHT OF SUFFRAGE: THE ENFORCEMENT ACT: RIGHTS OF COLORED MEN TO SERVE AS JURORS: CASES RELATING TO ELECTIONS: DUE PROCESS OF LAW: CIVIL RIGHTS CASES: MORMON POLYGAMY AND BIGAMY A PUNISHABLE CRIME: THE REMOVAL CASES: TENNESSEE *v.* DAVIS: JUILLARD *v.* GREENMAN: THE ZENITH OF FEDERALISM: POWER OF CONGRESS TO RE-ISSUE PAPER AS A LEGAL TENDER IN TIME OF PEACE: KILBOURN *v.* THOMPSON: RIGHT OF THE HOUSE OF REPRESENTATIVES TO PUNISH FOR CONTEMPT: CIVIL SERVICE: THE ELEVENTH AMENDMENT: LOUISIANA *v.* JUMEL: VIRGINIA COUPON CASES: INDIAN TRIBES THE WARDS OF THE NATION: EXCLUSION OF THE CHINESE: THE KANSAS LIQUOR LAW: THE CHICAGO ANARCHISTS: INTERSTATE COMMERCE: THE TELEGRAPH AN INSTRUMENT OF COMMERCE: POLICE REGULATIONS: THE GRANGER CASES: MISCELLANEOUS CASES: LOUISIANA LOTTERY: TELEPHONE CASES: SKETCHES OF ASSOCIATE JUSTICES GRAY, BLATCHFORD AND LAMAR.

THE death of Chief Justice Chase, which occurred upon the 7th of May, 1873, was not an unexpected event.

For many months he had been sinking slowly beneath the deadly pressure of the effects of overwork,—a cause similar to that which had deprived him of the services, as a judicial associate, of his old colleague in the Cabinet, Mr. Stanton. As a Judge, he had displayed much greater moderation of temper, in considering questions involving the character and extent of the powers of the National Government, than had been expected of one who had been foremost among the mightiest combatants for the Nation's existence. The serene and elevated atmosphere of the bench had cooled his blood, and he sat in dignified calmness reviewing his own acts, and fearlessly pronounced them to be in his judgment

mere expedients of war, justified by a strange and terrible emergency, but lacking the essential features of Constitutionality when brought to the final test of the supreme law.

The President offered the vacant chair to Roscoe Conkling, who declined it. The names of George H. Williams, Attorney General, and of Caleb Cushing, an ex-Attorney General of the United States, were then sent to the Senate; but both failed of confirmation. Morrison R. Waite, of Ohio, was then chosen, and was almost immediately and unanimously confirmed, his commission being dated the 21st day of January, 1874.

Some of the most important questions ever determined by the Court were to come before him for adjudication: the Constitutionality of the Enforcement Act; the interpretation of the latest Amendments; the right and power of the States to control and regulate the charges of railroads; the extending necessities of interstate commerce; the death struggle with polygamy; Federal control over elections; the power of the President to remove from office; the Virginia Land Cases; the distribution of the funds arising from the French Spoliation and the Alabama Claims; the power of Congress under the Legal Tender Acts in time of peace; the Virginia Coupon Tax Cases; the power of States to prohibit the liquor traffic; the repudiation of State debts, and the true meaning of the Eleventh Amendment; the questions arising out of the violence of the Chicago Anarchists, and the exclusion of the Chinese. These are the most remarkable of the matters debated before him, and among the most memorable in the jurisprudence of the Nation.

The new Chief Justice was a man almost unknown to the country. His reputation as a sound, sensible and well-informed lawyer, clear and precise in statement, exact in de-



*Mrs. Rosenthal*  
Philad. 90

*U. R. Maile*



monstration and unblemished in character, had never overstepped the limits of his State until he made his argument before the International Tribunal of Arbitration at Geneva, two years before his promotion to the Bench; but it was not many years before he displayed beneath the concentrated gaze of the nation the mental vigor and moral sturdiness which were the most conspicuous of his ancestral traits. Sprung from a rugged stock, with a touch of iron in the blood, he traced his descent from that Thomas Waite who boldly signed his name to the death warrant of Charles I, and whose son came to Massachusetts with Sir Harry Vane. The stern qualities of the regicide, though softened, were not lost by his descendants. The father of the Chief Justice, Henry Mattson Waite, was a well-known and highly-respected jurist, who had served as a member of the State Legislature and State Senate, as a Judge of the Supreme Court of Errors in Connecticut, and also as Chief Justice of the State.

Morrison Remick Waite was born at Lyme, Connecticut, on the 29th of November, 1816. He graduated from Yale in the year 1837, at the age of twenty-two, numbering among his class-mates William M. Evarts, Benjamin Silliman and Samuel J. Tilden. During the following year he read law in the office of his father, traveled extensively, and then, with the boldness of the pioneer, removed to Ohio, where he completed his legal studies with Samuel M. Young, in Maumee City. In 1839 he was admitted to the Bar, and formed a partnership with his preceptor, proving himself capable of grasping the minute details of legal controversy and of applying the principles of legal science to facts as they arose. Although devoting himself with singular fidelity to his profession, "the pupil of patient merit rather than the disciple of ambition," nothing of special importance occurred to dis-

tinguish his practice, which grew steadily from year to year. In 1850 he removed to Toledo, and there established a law firm, of which his youngest brother, Richard, became a partner. In the mean time the elder brother became widely known for his successful management of difficult cases, his studious habits and uprightness of character. Although devoid of brilliant talents, he had many opportunities of entering public life, all of which he declined; but he became, in a certain sense, the recognized leader of the Ohio Bar,—a position which he maintained for more than thirty years.

Originally an admirer of Henry Clay and a Whig in politics, when that party disbanded he became a Republican, and was a strong supporter of the policy of Mr. Lincoln's administration. Although urged to accept a nomination for Congress, he declined, and also twice refused a seat upon the Supreme Bench of Ohio. The only office he had held was in 1849, when he served a single term as a member of the Legislature. Simple in his habits, modest, unpretending and studious, a plain but strong man, a solid and substantial Common-law lawyer, bred of Common-law ancestors, he first became known to the Nation when selected by President Grant, in 1871, to represent the United States at Geneva before the Tribunal of Arbitration of the Alabama Claims, under the terms of the Treaty of Washington. Notwithstanding the distinguished reputations of his colleagues, Caleb Cushing and William M. Evarts, his argument in reply to Sir Roundell Palmer, establishing the liability of the English Government for permitting the Confederate cruisers to be supplied with coal in British ports during the Civil War, attracted wide-spread attention for its clear, forcible and succinct presentation of the facts and the robust and direct logic by which he carried conviction upon all points. Upon his

return, he quietly resumed his practice, and in 1873 was sent by both political parties as a delegate to the Ohio Constitutional Convention, of which he was immediately chosen President. From this station he was unexpectedly summoned to be the Chief Justice of the Nation.

He more than satisfied expectation. His remarkable administrative ability, his steadfast fidelity to legal truth, his sagacity and wisdom, his careful observance of all matters necessary to the successful conduct of his office, his dignity and firmness, his attention to arguments, his habit of viewing all questions in the clear dry light of reason, his promptness in the dispatch of business, and his inflexible integrity, not only won the respect, but commanded the confidence of the country. His personal appearance harmonized with his intellectual and moral endowments. A short, compact, but robust figure, a massive head set squarely upon shoulders of unusual breadth, a mouth unyielding in its outlines, an eye determined in its glance, yet kindly in its light, a voice rich and deep, a step deliberate but firm—these fairly indicated the character of the man.

His judicial style was clear and terse, and some of his most celebrated judgments are remarkable for vigor and brevity. Indulging but little in illustration or ornament, with no trace of passion save when his soul burned with righteous anger over the crime of polygamy, he worked out his results with calmness, and sustained his conclusions with abundant and convincing reasons.

In 1876 he refused to be a candidate for the Presidency, and in the following year declined to serve as a member of the Electoral Commission. At the time of his death he was one of the Peabody Trustees of Southern Education, and had been an earnest advocate of Congressional aid to schools for

the education of Southern negroes. He visited Europe in the summer of 1887, was entertained by Lord Chief Justice Coleridge, and in London was the guest of Lord Bramwell, Lord Fitzgerald, and Baron Huddleston. The London *Law Times* expressed the universal regret that the English Bar had been unable to give so high and honored a personage an official welcome, but as he visited London in the middle of the long vacation, a public ceremony in the Temple was impracticable. His visit, like that of his predecessor Ellsworth, impressed those whom he met with the simplicity of character but rugged strength of an American Chief Justice.

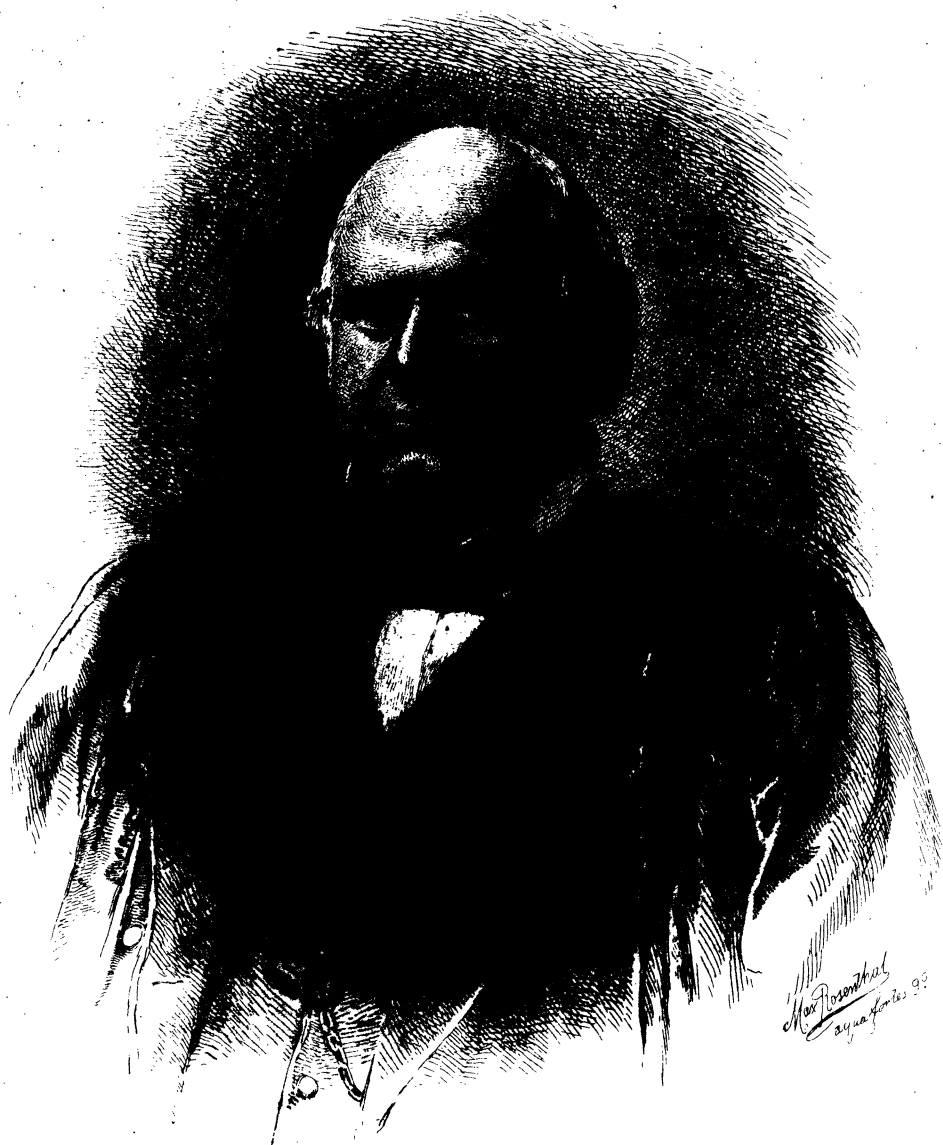
So temperately, judiciously and firmly did he discharge his official duties at a trying period in a region still agitated by the throes of war, that after his death the members of the Bar of South Carolina, assembled at Circuit, expressed their sense of his impartiality during the days of Reconstruction, and of his friendliness of manner. "Fortunate indeed," said one, "that there was a man who, amidst the furious passions that rent the country and shook the land, could hold in his steady and equal hand the balance of justice undisturbed."

At Circuit his manners were dignified, graceful and winning, but unassuming. Though genial, his bearing commanded respect, and his private character was pure and noble. As a presiding officer he was a model of deportment, and exceedingly urbane. No disorder or levity was ever attempted in his presence. Yale College conferred upon him the degree of LL.D. in 1872, Kenyon College in 1874, and the University of Ohio in 1879.

John Marshall Harlan, of Kentucky, who bears the name of the great Chief Justice whose principles he has warmly espoused, was commissioned as an Associate Justice upon the 29th of November, 1877, in place of Mr. Justice Davis, who







John M. Harlan

had resigned. He was born on the first day of June, 1833, in Boyle County, Kentucky; received an academic education, was graduated from Centre College in that State, in 1850, and prepared for the bar in the Law Department of Transylvania University, where he had the benefit of instruction under two of Kentucky's greatest Chief Justices—Robertson and Marshall. His father, James Harlan, had been a distinguished member of Congress and Attorney-General of his State, accepting in 1862, at the special request of President Lincoln, the office of United States Attorney for the Kentucky District, and holding that position until his death. He was a lawyer of distinction and a leading member of the Bar of his State, living at Frankfort, the State Capital, where he enjoyed a large practice in the Court of Appeals. The son studied and practiced with his father, and was thus brought into familiar intercourse with all the judges and lawyers of note. Admitted to the bar in 1853, five years later he was elected Judge of the Franklin County Court, but held the office but a single year. In 1859 he was nominated as the candidate of the Whig or opposition party for Congress in the "Ashland District," recently represented by John C. Breckinridge and James B. Clay, and was defeated by only sixty-seven votes. In the Presidential contest of 1860 he was an Elector on the Bell and Everett ticket, and in the Spring of 1861 moved to Louisville, where he became a law partner of the Hon. W. F. Bullock.

When the Civil War broke out he unhesitatingly took an active part in support of the National Government at a time when the loyalty of his State was doubted by many and the action of every citizen was of moment. He organized and became colonel of the Tenth Kentucky Volunteer Infantry, one of the regiments constituting the original division of Gen-

eral George H. Thomas, remaining in active service in the field until the death of his father required his presence at home. Although nominated to the office of Brigadier-General, he was obliged for private reasons to tender his resignation and return to civil life. In 1863 he was elected to the office of Attorney-General, removing his residence to the capital of the State, and in 1867 returned to active practice in the city of Louisville. He took a prominent station in the councils of the Republican Party, and in 1871, against his personal inclinations, accepted a unanimous nomination for the office of Governor. Although defeated he received a vote which showed a large increase over the Republican vote of former years. In 1872 at the State Republican Convention, his name was presented to the National Republican Convention in connection with the Vice-Presidency. In 1875 he was again compelled to accept the nomination of his party for Governor, and after a thorough and vigorous canvass increased the Republican vote of the State.

Although it was expected that he would become Attorney-General in the Cabinet of President Hayes, political complications in other States required a different arrangement, and at a later day he was offered a foreign mission, which he declined, preferring not to hold any office disconnected from his profession. He served as a member of the Louisiana Commission in 1877, and in November of the same year, was commissioned as an Associate Justice of the Supreme Court.

At the time he took his seat he was but forty-four years old. But seven other Justices had ascended that bench at an earlier age—Curtis, Campbell and Todd, at the age of forty-two; Iredell, at thirty-nine; Washington, at thirty-six; William Johnson at thirty-three, and Story at thirty-two. while Jay and McLean were of the same age as Harlan.

In the prime of physical and mental manhood and enthusiastically interested in the discharge of his duties, he bent all his energies to the great work before him, and his judicial reputation has grown from year to year. Careful in preparation, lucid and forcible in style, selecting his words with scrupulous care and disposing of the cases before him with promptness and decision, he has taken high rank as a jurist. A careful student of the science of government and the history of the growth of free institutions, he was called upon to fill the chair of Constitutional Law in the Columbian University of the City of Washington, and quite recently his course of lectures has been so enlarged as to embrace Public and Private International Law.

Upon Constitutional questions he adheres closely to the doctrines of Marshall in support of National authority, and some of his most vigorous opinions have been those dissenting from the construction placed by the majority of the Court upon the Thirteenth, Fourteenth and Fifteenth Amendments, all of them marked by a strong individuality of style.

The most noticeable expression of his views is to be found in his dissenting opinion in the Civil Rights cases, in which he maintained that the deprivation of the rights involved was an incident of slavery, and that power was, therefore, given to Congress under the Thirteenth Amendment by appropriate legislation to secure all citizens against such deprivation on account of a previous condition of servitude. He further pointed out that while the second and third clauses of the Fourteenth Amendment were, in form, prohibitions against actions by the States which might operate as a denial of equal rights, immunities and privileges to any of the citizens of the United States, yet the first clause did not refer solely to action by the States, but directly

secured such rights to black citizens, and thus empowered Congress to pass laws acting directly upon and in favor of such citizens. This opinion he pronounced without note or memorandum, subsequently enlarged and reduced to writing. Ardently attached to freedom and free institutions, and anxious that they might be preserved intact, he has exhibited in every opinion involving private rights an intense desire to wipe away technicalities which stand in the way of reaching substantial equity and justice.

Upon the resignation of Mr. Justice Strong, William B. Woods, of Georgia, was commissioned as an Associate Justice on the 21st of December, 1880. He was born at Newark, Licking County, Kentucky, on the 3d of August, 1824. His father, Ezekiel Woods, of Scotch-Irish parentage, was a native of Kentucky, and his mother was of New England blood. He was educated at Western Reserve College, at Hudson, where he was a classmate of George F. Hoadley, and was subsequently sent to Yale, from which he graduated, in 1845, with distinction. He then studied law in his native town under Hon. S. D. King, and practiced there, forming a copartnership with his preceptor, to whose careful teaching and conscientious example, he states, he owed his subsequent success in life. In politics he was a prominent Whig, and later became a leader in the Democratic party. In 1856 he was chosen Mayor of his native town, and in the following year was sent to the State Legislature, serving as Speaker of the House with the reputation of being the best of presiding officers, and securing a re-election. Upon the outbreak of the Civil War he entered the army as Lieutenant Colonel of the Seventy-Sixth Ohio Regiment of Volunteers, and until the end of the war, with the exception of three months, was constantly engaged in the field. He participated in the battles of Shi-



W B Woods





loh, Chickasaw, Bayou Ridge, Arkansas Post, where he was slightly wounded, and at Resaca, Dallas, Atlanta, Jonesville, Lovejoy Station and Danville. He was present also at the sieges of Vicksburg and Jackson, and commanded a division in General Sherman's army during its march to the sea. He was appointed Brevet Brigadier-General of Volunteers on the 12th of January, 1865, and Brevet Major-General on the 31st of May of the same year, and was mustered out of service in 1866.

Upon leaving the army he went to Alabama, where he engaged in cotton-planting, and also resumed his law practice, taking an active part in the reconstruction of the State, of which he was appointed Chancellor in 1868. The duties of this office he discharged to the satisfaction of the public, and resigned it because of his appointment by President Grant as United States Circuit Court Judge for the Fifth Circuit, at that time including Georgia, Florida, Alabama, Louisiana, Texas and Mississippi, a post which he held at the time of his promotion to the Supreme Bench by President Hayes. His decisions as a Circuit Judge are reported by himself, in four volumes. His judicial service in the Supreme Court was but little more than six years, but during that time he delivered opinions which sustained the reputation which he had acquired at Circuit, as a painstaking and sensible Judge, of unflagging industry and of saving common sense. His knowledge and experience in relation to the laws of the Southern States were of especial service to the Court in deciding cases arising in that part of the Union.

Some idea of the increase in the business of the Supreme Court can be formed from the statement that during the six years that he was upon the bench, he wrote the opinion of the Court in 218 cases, while Mr. Justice Curtis, who was upon

the bench the same number of years, wrote but fifty-six opinions in all.

The most elaborate of his efforts are those in the Mormon Bigamy case of *Miles v. United States*,<sup>1</sup> the last branch of the celebrated Myra Clark Gaines controversy,<sup>2</sup> and his demonstration that that portion of the Revised Statutes of the United States which made it a criminal offence for two or more persons in a State or Territory to conspire to deprive any person of the equal protection of the laws of a State was unconstitutional,<sup>3</sup> and his maintenance of the Constitutionality of the military code of Illinois prohibiting unauthorized military organizations, drilling or parades, in which he showed that the law in question did not violate the Second Amendment securing to the people the right to keep and bear arms.<sup>4</sup>

Upon the retirement of Mr. Justice Swayne, Stanley Matthews, of Ohio, was duly commissioned an Associate Justice, upon the 12th of May, 1881. Journalist, Lawyer, Judge, Soldier, Politician, Legislator, and Jurist, in each stage of his varied career he displayed a powerful will and a vigorous mind. His father was a professor of mathematics in Transylvania University, at Lexington, Ky., and a ruling Elder in the Presbyterian church. Mr. Matthews was born in Cincinnati, Ohio, upon the 21st of July, 1824, graduated from Kenyon College in 1840, studied law, was called to the bar, and settled in Maury County, Tennessee, but shortly after returned to his native city. He was early engaged in the anti-slavery movements, and was from 1846 to 1849 assistant editor of the Cincinnati *Herald*, the first daily anti-slavery newspaper in that city. A disciple of Chase, he devoted himself

<sup>1</sup> 103 U. S., 304 (1880).

<sup>3</sup> *United States v. Harris*, 106 U. S. (1882).

<sup>2</sup> *Davis v. Gaines*, 104 U. S., 386 (1881). <sup>4</sup> *Presser v. Illinois*, 116 U. S., 252 (1885).



Stanley Matthews



to the cause with impetuous energy. In 1851 he became a Judge of the Court of Common Pleas of Hanover County, a State Senator in 1855, and from 1858 to 1861 served as United States Attorney for the Southern District of Ohio. In March of 1861 he was commissioned as Lieutenant-Colonel of the Twenty-third Ohio Regiment, serving in West Virginia at the battles of Rich Mountain and Carnifex Ferry. In October of that year, he was appointed Colonel of the Fifty-seventh Ohio, and commanded a brigade in the Army of the Cumberland, being engaged at Dobb's Ferry, Murfreesboro, Chickamauga and Lookout Mountain. Resigning from the Army in 1863, he became a Judge of the Superior Court of Cincinnati. In 1864 he was a Presidential Elector, an office which he also held in 1868. At first a Rationalist and later a Unitarian, he became after serious study, a convert to Calvinism. In 1864 he was a delegate from the Presbytery of Cincinnati to the General Assembly of the Presbyterian Church at Newark, N. J., and as one of the Committee on By-laws, reported the resolutions relating to slavery. In 1876 he was defeated as a Republican candidate for Congress, and the next year was one of the counsel who argued the cases of the Republican electors before the Electoral Commission, making the principal argument in the Florida and Oregon cases—an argument which Senator Edmunds declared stood "almost first among the foremost of the strictly legal and Constitutional considerations that should have influenced, and, I think, did influence the judgment of that tribunal." In March of that year he was elected United States Senator in place of John Sherman, who had resigned to become Secretary of the Treasury, and the following year was promoted to the Supreme Bench.

Although strongly opposed in the Senate, because of the

views he was supposed to entertain towards corporations, the most eminent of his critics, standing by his bier, had the candor to state that his opinions and his assent to those delivered by other judges upon that class of questions had convinced him as well as other Senators that they were mistaken in doubting his judicial capacity and independence. Upright and candid, a helpful and sympathizing friend to the younger members of the bar, fair and just in logic, rich in legal learning, clear in statement, gentle in disposition, affable in conduct, patient and attentive, he won, during the seven years of his judicial service, the respect of his associates, the confidence of the bar, and gave each year fresh assurance of continued growth and predominance. His death elicited the most eloquent and affectionate eulogies from political opponents as well as friends.

His opinions evince research and care, and at times he dissented most vigorously from the doctrines established by the judgment of the majority of the Court—the most noticeable instance being in the well-known case of *Kring v. Missouri*,<sup>1</sup> in which he protested against such an extension of the Constitutional principle forbidding *ex post facto* laws as would result in the escape of a convicted murderer, when, as he contended, the substance of the prisoner's defence upon the merits had not been touched; where no vested legal right under the law had wrought a result upon his legal condition before its repeal.

When Chief Justice Waite ascended the bench in 1874, no graver or more important duties had ever been cast upon the Court. He and his colleagues were confronted by a "broken" condition of social, of legal, of political and of public

<sup>1</sup> 107 U. S., 221 (1882).

affairs. Full of pith and meaning was that one word "Reconstruction," which has become a synonym of the period. Everywhere re-arrangement was necessary, the wastes of war were to be repaired, "the symmetry and strength of judicial predominance over passion" were to be restored and re-established. It was a period of conservative reaction and the conduct of the Court reflected that tendency. The circumspect traits of character of the Chief Justice sustained the impulse imparted by the decision in the Slaughter House Cases on the lines of moderation, and resulted in an interpretation of the Thirteenth, Fourteenth and Fifteenth Amendments which was a surprise to many statesmen, and a disappointment to those who saw, or thought they saw, a more comprehensive chart of liberty sketched in bold outline by men from whose eyes the scales had fallen in the lurid light of civil war. It was information that was new to the framers, said Mr. Shellabarger, when they were told that by those Amendments it was not intended to add anything to the rights of one citizen as against another; that it was not designed to enable Congress to legislate affirmatively or directly for the protection of civil rights, but only to use corrective and restraining measures as against the States so as to secure to the black race the right to be dealt with as equals. It was information that was new, as well as unwelcome, that the provisions creating National citizenship and prohibiting the abridgment of the privileges thereof, and prohibiting the States from depriving any person of life, liberty, property, or the equal protection of the laws, and giving to Congress the power to enforce these provisions by appropriate legislation, added nothing to existing rights, but simply provided additional guarantees for such as already existed. But now, after the lapse of years, when the temper and spirit in which the text of the Amendments was penned have cooled,

and the views of men have matured, it is seen on a survey of all the decisions considered as a body, that the value of the Court as the great conservative department of the government was never greater than then, and that the gratitude and veneration of the Republic in all coming generations will be due to it for having guided the country in safety through many perils, and for having fixed its institutions upon high, just and stable foundations.

The first decision of importance belonging to the class referred to, and one of the earliest delivered by Chief Justice Waite, involved the meaning of the word "citizen" under the provisions of the Fourteenth Amendment, and it was held that although all women are citizens in the sense of being members of a political community or nation, yet as the Constitution had not added the right of suffrage to the privileges and immunities of citizenship as they existed at the time it was adopted, and as the Amendment did not create new rights, but simply furnished an additional guarantee for the protection of such as were already enjoyed, it followed that the Constitutions and laws of the several States which committed the important trust of suffrage to men alone, were not necessarily void.<sup>1</sup>

This was followed by the case of the *United States v. Reese*,<sup>2</sup> in which an indictment had been found in the District of Kentucky against two inspectors of a municipal election, for refusing to receive and count the vote of a colored man. A demurrer was filed and the question arose whether the Act of Congress, which declared the right of all citizens to vote without distinction of race, color, or previous condition of servitude, had provided an adequate punishment for its violation.

<sup>1</sup> *Minor v. Happersett*, 21 Wallace, 162 (1874).

<sup>2</sup> 92 U. S., 215 (1875).



It was shown that the Fifteenth Amendment did not confer the right of suffrage upon any one, but was simply intended to prevent the States from giving a preference in this particular to one citizen of the United States over another, and as Congress had not provided in direct terms for the punishment of the specific offence charged, and as the Act under consideration was a penal statute, a strict construction must prevail; the Court could not introduce words of limitation so as to make that specific which was expressed in general terms only. Hence the decision of the lower Court sustaining the demurrer was affirmed.

“It would certainly be dangerous,” said the Chief Justice, “if the legislature could set a net large enough to catch all possible offenders, and leave it to the Courts to step inside and say who could be rightfully detained, and who should be set at liberty. This would to some extent substitute the judicial for the legislative department of the Government. The Courts enforce the legislative will when ascertained, if within the Constitutional grant of power. Within its legitimate sphere, Congress is supreme and beyond the control of the Courts; but if it steps outside of its Constitutional limitation, and attempts that which is beyond its reach, the Courts are authorized to, and when called upon in due course of legal proceedings, must annul its encroachments upon the reserved power of the States and people. To limit this statute in the manner now asked for, would be to make a new law, not to enforce an old one. This is no part of our duty.”

Mr. Justice Clifford agreed that the indictment was bad, but for reasons widely different from those assigned by the Court, but Mr. Justice Hunt dissented in a most elaborate opinion.

The Constitutionality of the *Enforcement Acts* was considered in *United States v. Cruikshank*,<sup>1</sup> and it was held that

<sup>1</sup>92 U. S., 542 (1875).

while the Fourteenth Amendment prohibited a State from depriving any person of life, liberty or property without due process of law, and from denying to any person within its jurisdiction the equal protection of the laws, yet this provision did not add anything to the fundamental rights of the citizen under the Constitution; that the duty of every republican Government to protect all its citizens in the enjoyment of an equality of rights was originally assumed by the States, and still remained there; and that the only obligation resting upon the United States was to see that the States did not deny such rights. This the Amendment guaranteed, but no more, and the power of the National Government was limited to the enforcement of this guarantee. Hence on an indictment in which it did not appear that the intent of the defendants was to prevent parties from exercising their right to vote on account of their race, it was held that it did not appear that it was their intent to interfere with any right granted or secured by the Constitution or laws of the United States, and that counts in such indictment which did not declare that it was the intent of the defendants by conspiracy to hinder or prevent the enjoyment of any right granted or secured by the Constitution, were insufficient to sustain a conviction.

In this judgment Mr. Justice Clifford concurred, but for reasons quite different from those stated by the Court.

In *Strauder v. The State of West Virginia*,<sup>1</sup> more positive results were reached. It was held that the Fourteenth Amendment was intended to secure to a recently emancipated race all the civil rights of the superior race, and to give it the protection of the General Government in the enjoyment of such rights when denied by the States. Citizenship and the

<sup>1</sup> 100 U. S. 303 (1879).

privileges of citizenship were intended to be protected. No legislation of a State discriminating against men on account of color was Constitutional, and therefore a statute of the State of West Virginia denying to colored citizens the right to act as jurors because of their color, though qualified in other respects, was pronounced to be unconstitutional, inasmuch as the State statute secured to every white man the right of trial by jury selected from and without discrimination against his race, and at the same time discriminated against the blacks; the latter race, therefore, did not enjoy the equal protection of the laws. It was not a question, Mr. Justice Strong pointed out, whether a colored prisoner had a right to be tried by a petit jury composed in whole or in part of persons of his own race or color, but whether in the selection of the jury all persons of his race should be excluded by law because of their color, so that by no possibility could a colored man sit upon the jury. From this judgment Justices Field and Clifford dissented.

In the case of *Virginia v. Rives*<sup>1</sup> the Fourteenth Amendment was still further considered, and it was held that it is a State which is prohibited from denying to any person the equal protection of the laws. Two colored men had been indicted in a State Court for murder. The case was removed to the Circuit Court of the United States, and the defendants moved the Court that the venire, which was composed entirely of white men, be so modified as to allow one-third of the panel to be composed of colored men. It was held that inasmuch as Virginia, by her statute, had not forbidden colored men to serve as jurors, there was no act by the State which came in conflict with the provisions of the

<sup>1</sup> 100 U. S. 313 (1879).

Amendment; that that Amendment referred solely to State action, and could not operate upon any action of private individuals. There must be either a legislative denial or disability resulting from it, and in the absence of these features, no one could swear, before his case came to trial, that his civil rights were denied. Mere apprehension was not sufficient. With regard to obstacles to the enjoyment of rights, arising from other causes than from legislative denial, persons of the colored race must take their chances of removing them, or proceed against the offenders in the manner open to the rest of the community. In this judgment Justices Field and Clifford concurred, but for reasons widely different from those stated in the opinion of the Court, the former stating that there could be no assumption by a Federal Court of jurisdiction of offences against the laws of a State.<sup>1</sup>

In *Ex parte Virginia*<sup>2</sup> a county judge had been charged by law with the duty of selecting jurors, and was indicted in the District Court of the United States for excluding certain citizens from his choice, in violation of the Act of March 1, 1875, intended to enforce the provisions of the Fourteenth Amendment, being influenced in his conduct, as was alleged, by a consideration of the race and color of the men excluded. Being in custody, he presented to the Supreme Court a petition for a writ of *habeas corpus* and a writ of

<sup>1</sup> In *Missouri v. Lewis*, 101 U. S. 22 (1879) it was held that the Fourteenth Amendment did not prohibit the State from making political subdivisions of its territory, regulating its local government, including the constitution of Courts and their appellate jurisdiction, establishing one system of law in one portion of its territory, and another system in another, so long as, it did not abridge the rights and immunities of its citizens. The opinion was delivered by Mr. Justice Bradley, and sustained the right of the States to limit by statute the jurisdiction of their Courts, the right of appeal, and to make it exercisable under different circumstances in different parts of the State.

<sup>2</sup> 100 U. S. 339 (1879).

*certiorari* to bring up the record. It was held that, while such a writ could not be made to serve the purpose of a writ of error, if a prisoner be held without lawful authority, by an order which an inferior Court of the United States had no jurisdiction to make, the Supreme Court would, in favor of liberty, grant the writ, not to review the case, but to examine the authority of the Court below to act. It was also held that as Congress had enforced the provisions of the Amendment by appropriate legislation, a State could act by its judicial authorities as well as through its Legislature; that the Judge was the agent of the State, and that the Amendment meant that no agency of the State should be exerted in the selection of jurors, which was not a judicial act, and deny to any person the equal protection of the laws by excluding colored men from the jury. Although the discretion of the Judge could not be coerced, yet inasmuch as the statute gave him no discretion to reject colored men in selecting jurors, he was properly indictable. Mr. Justice Field dissented in a most elaborate opinion, which was concurred in by Mr. Justice Clifford. They contended that the indictment was defective; that the State statute vested in the Judge the power of selecting a jury, and, in this selection, he was to exercise his discretion as to "such persons as he thought well qualified to serve as jurors," but that the statute itself made no discrimination against color or race, nor had the Judge done so; for his mere failure to select colored men was no sufficient proof of an intent to discriminate. Nor could Congress exercise a supervisory power over the methods of State officers in the discharge of their official duties. A most exhaustive discussion of the nature of our government and of the relation of the Federal Government to the States was entered upon, and it was insisted that Congress could

not interfere with the administrative functions of the States. No doctrine could be more destructive of State autonomy or more humiliating or degrading.

In *Ex parte Siebold*<sup>1</sup> the question was discussed whether in the regulations of elections for members of Congress the National and State Governments could or could not co-operate, or whether their action must be exclusive of each other, so that if Congress assumed to regulate the subject at all, it must assume exclusive control. It was held by Mr. Justice Bradley that there was nothing in the Constitution to prevent such co-operation, and a concurrent jurisdiction was contemplated; that of the State, of course, being subordinate to that of the United States, but only to the extent to which Congress had seen fit to interfere.

"It seems to be often overlooked," said he, "that a National Constitution has been adopted in this country, establishing a real Government therein, operating upon persons and territory and things; and which, moreover, is or should be as dear to every American citizen as his State Government is. Whenever the true conception of the nature of this Government is once conceded, no real difficulty will arise in the just interpretation of its powers. But if we allow ourselves to regard it as a hostile organization, opposed to the proper sovereignty and dignity of the State Governments, we shall continue to be vexed with difficulties as to its jurisdiction and authority."

Justices Field and Clifford again dissented, contending that it was incompetent for the Federal Government to enforce, by coercive measures, the performance of a plain duty, imposed by Congress upon the executive officer of a State, and that it would seem to be equally incompetent for it to enforce, by similar measures, the performance of a duty imposed upon him by a law of a State; that Congress could not

<sup>1</sup>100 U. S. 391 (1879).

punish for the non-performance of a duty which it could not prescribe, and that it was a contradiction in terms to say that it could inflict punishment for disobedience to an act the performance of which it had no Constitutional power to command.<sup>1</sup>

In *Neal v. Delaware*<sup>2</sup> it was held, in an opinion by Mr. Justice Harlan, that the Constitution of Delaware, which had been adopted in 1831, and gave the right of suffrage, with a few special exceptions, to "free white male" citizens, was in conflict with the Fifteenth Amendment, the effect of which was to annul so much of the State Constitution as was inconsistent therewith, and that thenceforward the jury statute was enlarged in its operation so as to render colored citizens, otherwise qualified, competent to serve as jurors in the State Courts. From this judgment Chief Justice Waite dissented, on the ground that the mere fact that persons of color had not been allowed to serve on juries where colored men were interested, was not enough to show that the defendants had been discriminated against because of their race, and that he could not believe that the refusal of the Court below, upon an affidavit unsupported by evidence, to quash the indictment and quash the panel of jurors, because the defendant had been discriminated against on account of his race, was such an error in law as to justify a reversal of the judgment. Mr. Justice Field dissented substantially on the same grounds.

"To afford equality of protection," said he, "to all persons by its laws, does not require the State to permit all persons to participate equally in the administration of those laws, or to hold its offices, or to discharge the trusts of government. Equal protection of the laws of a State is extended to persons within its jurisdiction, within the meaning

<sup>1</sup> See also *Ex parte Clarke*, 100 U. S. 399 (1879).

<sup>2</sup> 103 U. S. 370 (1880).

of the Amendment, when its Courts are open to them, on the same terms as to others, with like rules of evidence and modes of procedure for the security of their persons and property, the prevention and redress of wrongs and the enforcement of contracts; when they are subjected to no restrictions in the acquisition of property, the enjoyment of personal liberty and the pursuits of happiness which do not equally affect others; when they are liable to no other nor greater burdens nor charges than such as are laid upon others, and when no different nor greater punishment is enforced against them for a violation of the laws."

In a later case<sup>1</sup> Federal control over elections for members of Congress was distinctly sustained, and such control was not diminished or annulled because an election for State officers was held at the same time or place. While affirming the doctrine that the Fifteenth Amendment gave no affirmative right to the black man to vote, but simply prevented discrimination against him whenever the right was granted to others, yet it was asserted that under some circumstances it might operate as the immediate source of a right to vote. Thus in all cases where the States had not removed from their Constitutions the words "white man" as a qualification for voting, the provision did have the effect of conferring on him the right to vote because it annulled the word *white*, and thus left him in the enjoyment of the same rights as white persons. The particular offence charged was that of conspiring to intimidate a black voter, and prevent him by beating and wounding from voting for a member of Congress.

"If the Government of the United States," said Mr. Justice Miller, "has within its Constitutional domain no authority

<sup>1</sup> *Ex parte Yarbrough*, 110 U. S., 651 (1883). The same principle was sustained as to a conspiracy to prevent a person from exercising the right to make effectual his homestead entry, *United States v. Waddell*, 112 U. S., 76 (1884); and as to a conspiracy to drive the Chinese from their homes, *Baldwin v. Franks*, 120 U. S., 678 (1886).



to provide against these evils, if the very source of power may be poisoned by corruption or controlled by violence and outrage, without legal restraint, then, indeed, is the country in danger and its best powers, its highest purposes, the hopes which it inspires and the love which enshrines it, are at the mercy of the combinations of those who respect no right but brute force, on the one hand, and unprincipled corruptionists on the other."

Another class of rights within the protection of the Fourteenth Amendment was considered in *Kennard v. State of Louisiana*,<sup>1</sup> the Chief Justice showing that an Act of a State, by which provision had been made for the trial of a case before a Court of competent jurisdiction, by bringing the accused before the Court, and notifying him of the charge he was required to meet, thus giving him an opportunity to be heard, and also providing for due deliberation and judgment on the part of the Court, and for an appeal to the highest Court of the State, was not in violation of the provisions of the Constitution which prohibited any State from depriving any person of life, liberty or property without due process of law.

And in *Walker v. Sauvinet*<sup>2</sup> the question whether a citizen had been deprived of the right of trial by jury was discussed, and it was held that the requirement of the Constitution that a person could not be deprived of his property without due process of law, did not imply that all trials in the State Courts affecting property must be by jury; that the Constitutional requirement was fully met if the trial was had according to the settled course of judicial proceedings; that due

<sup>1</sup>92 U. S., p. 480 (1875). Affirmed in *Foster v. Kansas*, 112 U. S., 201 (1884).

<sup>2</sup>92 U. S., 90 (1875), affirming *Edward v. Elliott*, 21 Wallace, 557 (1874). See also *Pearson v. Yeudall*, 95 U. S., 294 (1877), in which it was held that States might regulate Jury trials.

process of law was process according to the law of the land, which was subject to regulation by the law of the State, and inasmuch as the State Court had decided that the proceedings below were in accordance with the law of the State, it was not found to be contrary to the Constitution or any law or treaty of the United States, nor did the Fourteenth Amendment forbid the abridgment of the right of trial by jury in suits at common law in the State Courts.

In illustration of the doctrines thus established, the *Civil Rights Cases*<sup>1</sup> were decided. Congress, by an Act passed March 1, 1875, entitled "An act to protect all citizens in their civil and legal rights," had endeavored to secure to all persons within the jurisdiction of the United States the full and equal enjoyment of the accommodations, advantages and privileges of inns, public conveyances on land or water, theatres and other places of public amusement, subject only to such conditions and limitations as were established by law, and were applicable alike to citizens of every race and color, regardless of any previous condition of servitude. Suitable penalties were provided for any violation. In delivering the opinion of the Court, Mr. Justice Bradley declared that it was the simple purpose of the law to provide that no distinction should be made between citizens of different race or color, or between those who had, and those who had not, been slaves, and that its effect was to secure to such persons the same accommodations and privileges as were enjoyed by white citizens. But it was State action of a particular character that was prohibited. No individual invasion of rights was the subject matter of the Fourteenth Amendment, which did not invest Congress with power to legislate upon subjects which were within the domain of State legislation, but simply

<sup>1</sup> 109 U. S., 3 (1883).

provided modes of relief against State action. It did not authorize Congress to create a code of municipal law for the regulation of private rights, but to provide modes of redress against the operation of State laws and the actions of State officers, executive or judicial, whenever these were subversive of fundamental rights. But until some State law had been passed, or some State action, through its officers or agents, had been taken, adverse to the rights of citizens sought to be protected by the Amendment, no legislation of the United States, nor any proceeding under such legislation, could be called into activity. The civil rights guaranteed by the Constitution against State aggression could not be impaired by the wrongful acts of individuals unsupported by State authority in the shape of laws, customs or judicial or executive proceedings. If one individual did a wrong to another the remedy should be sought in the State tribunals, and until such right had been denied by State action, no ground for the interposition of Congress arose. The legislation authorized by the Amendment to be adopted by Congress for enforcing its provisions, was not direct legislation upon the matters respecting which the States were proscribed from making or enforcing laws or doing certain acts, but was *corrective* legislation, such as might be necessary or proper for counteracting and redressing the effect of such laws or acts. While the Thirteenth Amendment abolished slavery and involuntary servitude, and by its reflex action established universal freedom in the United States, and Congress might probably pass laws directly enforcing its provisions, yet such legislative power extended only to the subject of slavery and its incidents, and the denial of equal accommodations in inns, public conveyances and places of public amusement, imposed no badge of servitude incapable of redress in the ordinary

tribunals. The point that Congress under the commerce clause might pass a law securing to all persons equal accommodations on lines of public conveyance between two or more States, was not decided.

From this judgment and reasoning Mr. Justice Harlan dissented, because the opinion was based upon grounds entirely too narrow and artificial. He contended that the true meaning and purpose of the Amendment was to secure direct legislation by Congress in favor of the citizens, operating directly upon them, not limited to State action either by legislative act or judicial or executive interference. The Amendment was aimed at class tyranny, and was not limited to the colored race, which was denied by corporations and individuals wielding public authority rights fundamental to their freedom and citizenship. He predicted that at some future time it might be some other race which would fall under the ban of race discrimination, and that if the Constitutional Amendments were enforced according to the intent with which, as he conceived, they were adopted, there could not be in this Republic any class of human beings in practical subjection to another class, with power in the latter to dole out just such privileges as they might choose to grant.

From the consideration of the true scope and meaning of the *Post Bellum* Amendments and Civil Rights, we turn to a high moral question. In the case of *Reynolds v. United States*,<sup>1</sup> Chief Justice Waite delivered a notable opinion, deciding that bigamy in Utah was a crime against the United States, and punishable under the statutes for the government of the Territories. The question arose whether, under the First Amendment to the Constitution providing for civil and religious liberty, a man's religious

<sup>1</sup>98 U. S., 145 (1878).

belief could be accepted as a justification for committing an act made criminal by the law of the land. Reynolds had been married in Utah knowing that he had a wife living elsewhere, and set up by way of defence that the church of which he was a member enjoined polygamy. The Chief Justice, in a most interesting examination of the history of religious freedom and the statutory and Constitutional provisions intended to secure it, showed that marriage, while a sacred obligation, was a civil contract regulated by law, lying at the very foundations of society, the source of social relations, obligations and duties. Although Congress could not pass a law prohibiting the free exercise of religion, yet it was clearly within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy should be the law of social life under its dominion. Hence the statute under consideration was within the legitimate power of Congress and a Constitutionally valid act, as prescribing a rule of action for all those residing in the Territories. It could not be that those who were by religion polygamists could commit an act which the law declared to be a crime, and go unpunished, while those who were not polygamists were amenable to the criminal courts:

“Suppose,” said he, “one believed that human sacrifices were a necessary part of religious worship; could it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife justly believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?”<sup>1</sup>

<sup>1</sup>See also *Miles v. U. S.*, 103 U. S., 304 (1880); *Murphy v. Ramsey*, 114 U. S., 15 (1884), in which the Edmunds law prohibiting cohabitation with more than one woman was sustained; *Cannon v. United States*, 116 U. S., 55 (1885), in which bigamy was defined; and *Snow v. United States*, 118 U. S., 349 (1885).

A new and copious source of Federal power was now explored. The case of *Tennessee v. Davis*<sup>1</sup> embraced the relation of the General Government to the States. A deputy Collector of Internal Revenue had been indicted in a State court for murder. He filed a petition to remove the case into the Circuit Court of the United States, alleging that his act was committed in self-defence while discharging his official duties in seizing an illicit distillery. The case was brought to the Supreme Court upon a certificate of division of opinion between the judges in the Court below. It was argued, in an opinion by Mr. Justice Strong, that the United States Government, acting directly upon the States and the people of the States, though limited in its power, was supreme; so far as those powers extended no State could exercise them, or obstruct their exercise. The General Government would cease to exist if it could not enforce its powers within the States through the instrumentality of its own officers, and if, when thus acting within the scope of their authority, they could be arrested and brought to trial in a State Court for an alleged offence against the laws of the State in the performance of an act which was warranted by the Federal authority which they possessed—if the General Government could not interfere for their protection—if such protection depended on the States—it would be possible for any State at pleasure to arrest the operations of the General Government. It was asserted that the judicial powers of the United States, embracing all cases in law and equity, extended to civil and criminal cases alike, and it was shown by vigorous reasoning that the act for which Davis had been indicted had been done under and by virtue of his office, and while he was resisted by an armed force in his attempts to discharge his official duty:

<sup>1</sup> 100 U. S., 257 (1879).

"We come then to the inquiry," said he, "most discussed during the argument . . . . Has the Constitution conferred upon Congress the power to authorize the removal, from a State Court to a Federal Court, of an indictment against a revenue officer for an alleged crime against the State, and to order its removal before trial, when it appears that a Federal question or a claim to a Federal right is raised in the case, and must be decided therein? A more important question can hardly be imagined. Upon its answer may depend the possibility of the General Government's preserving its own existence."

It was shown that it was no invasion of the sovereignty of a State to withdraw from its courts into the courts of the General Government the trial of prosecutions for offences against the criminal laws of the State, whenever the defence presented a case arising out of an Act of Congress. The dual nature of our government could not be ignored. The States were not completely and in all respects sovereign. Congress had necessarily the right to provide for the removal of criminal causes as well as civil cases. In fact it was more necessary that this jurisdiction should be extended over criminal than over civil cases:

"If it were not admitted," said he, "that the Federal judiciary had jurisdiction of criminal cases, then was nullification ratified and sealed forever; for a State would have nothing more to do than to declare an act a felony or misdemeanor, to nullify all the laws of the Union."

Justices Clifford and Field dissented. In their judgment the case involved issues no less grave than the nature, extent and limitation of the judicial power of the United States, and they contended that the Federal Courts had no criminal jurisdiction, except such as was expressly conferred by an Act of Congress in pursuance of a Constitutional grant. As long as it had not been declared in express terms that resistance offered

to a revenue officer in the performance of his duty was a crime against the United States, the whole matter must be left to the State tribunals. They pointed out that no Act of Congress gave a revenue officer immunity to commit murder in a State, or prohibited the State from executing its laws for the punishment of the offender. Criminal homicide in a State was clearly an offence against the State, unless committed within the exclusive jurisdiction of the United States. They characterized it as an amazing proposition that an indictment for a wilful and felonious murder, pending in a State Court found by a grand jury of a State, under a statute of a State, and not involving any Federal question, could be removed from the State Court into the Circuit Court of the United States for trial, merely because the prisoner at the time he committed the homicide was a deputy collector of internal revenue.<sup>1</sup>

The final and most extraordinary extension of Federal power was now reached.

In *Juillard v. Greenman*<sup>2</sup> it was determined that Congress had the Constitutional power to make the Treasury notes of the United States a legal tender in payment of private debts in time of peace as well as in war, and that the Act of Congress of May 31st, 1878, which provided for the re-issue of notes, issued during the war of the Rebellion but which had been redeemed and paid in gold coin at the Treasury, was a Constitutional exercise of power, and that the Secretary of the Treasury could re-issue and keep in circula-

<sup>1</sup>The principle established by the decision has been firmly upheld and illustrated in the later cases of *Strauder v. Virginia*, 100 U. S., 303 (1879); *Virginia v. Rives*, *Ibid.*, 313 (1879); *Ex parte Virginia*, *Ibid.*, 339 (1879); *Railroad Company v. Mississippi*, 102 U. S., 140 (1880); *Davis v. South Carolina*, 107 U. S., 599 (1882); and the recent much discussed case, *In re Neagle*, 135 U. S., 1 (1890), in which the dissenting Justice, Field, was directly concerned.

<sup>2</sup>110 U. S., 421 (1884).



tion such notes, and that when re-issued, they were legal tenders. It was strongly contended by Senator Edmunds and Mr. William Allen Butler as counsel that the previous decisions of the Court<sup>1</sup> had simply established the legal tender quality of Treasury notes as a temporary expedient, necessary as a means of averting National destruction, but otherwise unjustifiable, and that the debates in Congress, the declarations of the Executive department, as well as the language of the Judicial department went no farther, that in the absence of public exigency legal tender legislation was not a means appropriate to any legitimate end of government; that inasmuch as an exigency created a power, so it limited the duration of the power, and that any attempt to exercise it after the war which had called it into being had closed, and had been succeeded by the calm and order of established peace, was in excess of any power reposed by the Constitution in Congress. The opinion was delivered by Mr. Justice Gray, who re-examined the entire question, and after a full consideration of the Acts, declared that the Court was of opinion that no distinction in principle could be drawn between the cases theretofore determined, and the one at bar. Having satisfied itself of the existence of the power, the Court declared that the question of the propriety of its exercise at any particular time, whether in war or peace, was a question entirely for the determination of Congress, and was not a judicial question. The Court, therefore, declined to pass the line which circumscribed the Judicial department to tread on legislative ground. From this judgment Mr. Justice Field alone dissented in an opinion replete with learning and marked by vigorous and emphatic reasoning. He contended that the decision of the Court would

<sup>1</sup>Legal Tender Cases, 12 Wallace, 528 (1870).

breed many evils, and that hereafter no restraint could be imposed upon unlimited appropriations by the Government for all imaginary schemes of public improvement if the printing press could furnish the money that was needed for them.<sup>1</sup>

In the great case of *Kilbourn v. Thompson*,<sup>2</sup> Mr. Justice Miller had occasion to examine the right of the House of Representatives to punish citizens for contempt of its authority. Kilbourn had been summoned as a witness by a committee of Congress, and had refused to answer questions concerning the business of a real estate pool of which he was a member, and had refused to produce books and papers, which it was claimed had a bearing on the rights of the United States as a creditor of Jay Cooke & Co., then in bankruptcy, the firm having a large interest in the pool. By an order of the House he was imprisoned for forty-five days in the jail of the District of Columbia for his contempt. On his release he sued the Sergeant-at-Arms, who had executed the order, and the members of the committee who had been instrumental in securing it. It was held that each House could punish its own members for disorderly conduct or for failure to attend its sessions, and could decide cases of contested elections and determine the qualifications of its members, and exercise the sole powers of impeachment, and in the performance of such duties could summon witnesses, or punish them

<sup>1</sup>This decision awakened the most extraordinary excitement and led to criticism, discussion and argument in all quarters. Among the most noticeable of the papers produced by this great judicial debate was an adverse paper by George Bancroft, the eminent historian, entitled "A Plea for the Constitution of the United States Wounded in the House of its Guardians." See also a reply to Mr. Bancroft's argument by Mr. R. C. McMurtrie, of Philadelphia, an article in the "American Law Review," Vol. IV, p. 768, by Mr. Justice O. W. Holmes, Jr., of Massachusetts, and an article in the "Harvard Law Review" for May, 1887, Vol. I, p. 73, by Professor James B. Thayer, of the Harvard Law School. See also Bryce's "American Commonwealth," Vol. I, p. 264.

<sup>2</sup>103 U. S. 168 (1880).

for contumacy. But this power did not extend generally to the punishment of a witness for contumacy, unless his testimony was required in a matter into which the House had jurisdiction to inquire. But neither House possessed the general power of inquiring into the private affairs of a citizen. It could not be known until it had been fairly ascertained that the Courts were powerless to redress the creditors of Jay Cooke & Co.; and as the matter was still pending in court, Congress had no right to interfere, the subject matter of the investigation being judicial and not legislative. The doctrine which had been announced in *Anderson v. Dunn*<sup>1</sup>—that the finding of the House that the plaintiff had been guilty of contempt was conclusive—was limited, and partially overruled. It was denied that Congress possessed a general power of punishing for contempt. Wherever they proceeded in a matter beyond their legitimate cognizance, their right to fine and imprison a man was not beyond the power of the Courts to inquire into the grounds on which the order was made. The House of Representatives was not the final judge of its own powers and privileges in cases in which the rights and liberties of the citizen were concerned. No such arbitrary or uncontrollable prerogative existed. The resolution of the House finding Kilbourn guilty of contempt, and the warrant of its Speaker for commitment to prison, were not conclusive, and could not be pleaded by the Sergeant-at-Arms as a justification in an action brought against him for false imprisonment. But as the members of the committee had taken no part in the actual arrest, and were protected by the Constitutional provisions in relation to freedom of debate, no liability attached to them.

<sup>1</sup> 6 Wheaton, 204 (1821).

In the case of *Ex parte Curtis*<sup>1</sup> an Act of Congress was sustained which prohibited officers or employés from requesting, giving to, or receiving from any other officer or employé of the Government any money or property or other thing of value for political purposes, and a blow was thus struck, in behalf of Civil Service Reform, against involuntary political assessments. The Chief Justice based the decision upon the ground that the act simply prohibited officers or employés of the government from giving to or receiving from each other. Beyond this it restricted no political privileges. Its purpose was to promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service; such a purpose was clearly within the just scope of legislative power. Mr. Justice Bradley dissented. The effect of such a law, he contended, was to prevent the citizen from co-operating with other citizens of his own choice in the promotion of his political views, and the denial to a man of the privilege of associating and making joint contributions with such other citizens as he might choose, was an unjust restraint of his right to propagate and promote his views on public affairs.

In 1882 the conflagration which had been kindled in *Chisholm's Exrs. v. Georgia*, and smothered by the Eleventh Amendment, again broke forth. Could a State be sued? Could repudiation be successfully accomplished? Was there no redress for the injured creditor of a sovereign State? A number of cases came before the Court under the general title of *Louisiana v. Jumel*.<sup>2</sup> The Legislature had, by an Act, in 1874, provided for an issue of bonds consolidating and reducing the floating and bonded debt of the State. A

<sup>1</sup> 106 U. S. 371 (1882).

<sup>2</sup> 107 U. S. 711 (1882).

tax was imposed which was to be annually levied and collected for the purpose of paying the interest and principal of the bonds thereby authorized, and the revenues thus derived were to be set apart and appropriated to that purpose, and no other; and it was declared that it should be deemed a felony for any officer of the State to divert the fund. Immediately after the passage of this Act an Amendment to the Constitution was adopted, by which the issue of bonds was declared to create a valid contract between the State and the holders of the bonds, which the State could by no means impair. Six years later a new Constitution went into effect, by which the rate of interest on the consolidated bonds, previously authorized, was reduced, and the bondholders were given an option to demand in exchange for the bonds held by them bonds of new denominations, to be issued at the rate of seventy-five cents upon the dollar. The holders of the former bonds demanded payment of their coupons. Such payment was refused by the Auditor and Treasurer of the State. The question, as stated by the Chief Justice, was whether the contract between the bondholders and the State could be enforced, notwithstanding the new Constitution, by coercing the agents and instruments of the State, whose authority to levy and collect the tax had been withdrawn in violation of the terms of the contract, without having the State, in its political capacity, a party to the proceedings. The answer was in the negative. In reply to the argument that the State Treasurer was a trustee of the moneys in his possession for the benefit of the complainants it was shown that he was a mere keeper of the State funds, holding them as the agent of the State. If there was any trust, the State was the trustee, and unless the State could be sued, the trustee could not be enjoined. Nor could a committee of bondhold-

ers, by writ of mandamus, compel the executive officers of the State to perform their duties under the State law. The Courts of the Union could not claim jurisdiction over State officers in charge of public moneys, so as to control them as against the political power, in their administration of the finances of the State. The State had not submitted herself without reservation to the jurisdiction of a Court; and it was too clear for controversy that a suit against a State officer, in such a case as that at bar, was practically a suit against the State itself.

“The remedy sought,” said Chief Justice Waite, “in order to be complete, would require the Court to assume all the executive authority of the State, so far as it related to the enforcement of this law and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection and disbursement of the tax in question, until the bonds, principal and interest, were paid in full, and that, too, in a proceeding to which the State as a State was not and could not be made a party. It needs no argument to show that the political power cannot be thus ousted of its jurisdiction, and the judiciary set in its place.”<sup>1</sup>

Mr. Justice Field dissented, admitting that the sovereign cannot be held amenable to process in his own Courts without his consent, but contending that the conduct of the State was virtually a repudiation of her former engagements and a direct violation of the inhibition of the Federal Constitution against the impairment of the obligation of contracts. Wherever a State entered the markets of the world as a borrower,

<sup>1</sup> The same doctrine was substantially asserted in *Elliott v. Wiltz*, 107 U. S., 711 (1882), and *Cunningham v. Macon and Brunswick R. R. Co.*, 109 U. S., 446 (1883). An instance of where a State had provided a remedy against herself by mandamus is to be found in *Antoni v. Greenhow*, 107 U. S. 769 (1882), and it was held she could not modify the remedy so as to impair the obligation of the contract.

she laid aside her sovereignty for the time, and became responsible as a civil corporation; and although suits against her, even then, might not be allowed, yet her officers could be compelled to do what she had directed that they should do. He contended that where the State is concerned, the State should be made a party, if it can be done. That it cannot be done is a sufficient reason for the omission to do it, and the Court may proceed to decree against the officers of the State in all respects as if the State were a party to the record. In deciding who are parties to the suit, the Court will not look beyond the record. Making a State officer a party does not make the State a party, although her law may have prompted his action, and the State may stand behind him as the real party in interest.<sup>1</sup>

Mr. Justice Harlan also dissented. In his view the Constitution of Louisiana in effect nullified the previous undertakings of the State; the obligation of solemn contracts had been impaired; the judicial arm of the Nation was hopelessly paralyzed in the presence of an ordinance destructive of the rights of the bondholders, and passed in admitted violation of the Constitution of the United States. He contended that the suits were not brought against the State merely because they were brought against its officers; that the officers of Louisiana could not rightfully execute the provisions of the State Constitution which conflicted with the supreme law of the land; the Courts of the Union should not permit them to do so; but for the adoption of the Ordinance of 1879, the State officers could have been restrained by injunction from diverting funds collected to meet the interest on the consoli-

<sup>1</sup>He relied upon *United States v. Lee*, 106 U. S., 196 (1882), the famous suit brought for the recovery of the Arlington estate, now a National cemetery, and *Davis v. Gray*, 16 Wallace, 203 (1872).

dated bonds, and could have been compelled by mandamus to perform purely ministerial duties, enjoined by the statute and Constitution of 1874.

A similar result was reached in the cases of *New Hampshire v. Louisiana* and *New York v. Louisiana*,<sup>1</sup> which arose out of an effort on the part of the bondholders to obtain their rights through an assignment of their claims to the plaintiff States. It was held that inasmuch as they were precluded from prosecuting suits in their own names, they could not sue in the name of their respective States, even with the consent of the plaintiff States. A State could not allow the use of its name in such a suit for the benefit of one of its own citizens. A State was not an independent nation, clothed with the right and the faculty of making an imperative demand upon another independent State for the payment of debts which were owing to its citizens, nor could one State create a "controversy" with another State, within the meaning of that term as used in the Constitution, by assuming the prosecution of debts owed by the defendant State.

Although the practical result of these rulings was to enable the States to repudiate their debts, yet it was held that the meaning of the Eleventh Amendment was too clear to admit of evasion. Its evident purpose, promptly proposed as it had been upon the announcement of the decision in *Chisholm's Executors v. Georgia*, and almost immediately adopted, was to prohibit all suits against a State by or for citizens of other States or aliens, without the consent of the State to be sued. Such being the case, the Court was satisfied that it was prohibited both by the letter and the spirit of the Con-

<sup>1</sup> 108 U. S., 76 (1882).



stitution, from entertaining the suits, which were consequently dismissed.<sup>1</sup>

Several interesting cases relating to the Indian tribes arose at this period. In the first of these<sup>2</sup> it was held that an Indian was not a citizen of the United States within the meaning of the Fourteenth Amendment, even though he alleged that he was born within the United States and had severed his tribal relations, and fully and completely surrendered himself to the jurisdiction of the United States, and was a *bona fide* resident of the State of Nebraska. The opinion was delivered by Mr. Justice Gray, and was based upon the ground that an Indian could not make himself a citizen of the United States without the consent and co-operation of the Government; that the mere fact that he had abandoned his nomadic mode of life or tribal relations, and adopted the manners and habits of civilized people might be a good reason why he should be made a citizen, but did not of itself make him one; that citizenship of the United States was a political privilege which no one not born to could assume without the consent of the Government in some form. From this judgment Justices Harlan and Woods dissented because under the Fourteenth Amendment, all persons born or naturalized in the United States, and subject to the jurisdiction thereof, were citizens of the United States and of the State wherein they resided.

In a later case it was shown that by various treaties the United States had recognized the Cherokee Indians as one people, composing a single tribe or nation, and that when the Cherokees in North Carolina dissolved their connection with

<sup>1</sup>The converse of these cases is found in *Hagood v. Southern*, 117 U. S. 52 (1885), and the scope and purpose of the Eleventh Amendment is fully considered by Mr. Justice Matthews in *In re Ayers*, 123 U. S. 443 (1887).

<sup>2</sup>*Elk v. Wilkins*, 112 U. S., 94 (1884).

their nation, and refused to accompany the body of it on its removal, they had no separate political organization, and hence were not entitled to a share of an annuity fund created by sales of Cherokee lands west of the Mississippi; that they must be re-admitted to citizenship in the Cherokee Nation in compliance with its Constitution and laws if they wished to enjoy the benefits of its property.<sup>1</sup>

In a still later case<sup>2</sup> it was held that while the United States Government had recognized in the Indian tribes a state of semi-independence and pupilage, it had the right and authority, instead of controlling them by treaties, to govern them by Acts of Congress, and that they were necessarily subject to the laws which Congress might enact for their protection and for the protection of the people with whom they came in contact; that the States had no such power over them as long as they maintained their tribal relations; that they owed no allegiance to a State within which their reservation might be established, and that the State could give them no protection: hence it followed that an Act of Congress giving jurisdiction to the courts of the Territories of the crimes of murder, manslaughter, rape, assault with intent to kill, arson, burglary and larceny committed by Indians within the Territories, was Constitutionally valid, and gave jurisdiction in like cases to the courts of the United States over the same crimes committed on an Indian Reservation within a State of the Union.<sup>3</sup>

In 1885 the Court discharged certain Chinese prisoners who had been proceeded against under an ordinance of the city of San Francisco, providing that it should be unlawful

<sup>1</sup> Cherokee Trust Funds, 117 U. S., 288 (1885).

<sup>2</sup> U. S. v. Kagama, 118 U. S., 375 (1885).

<sup>3</sup> The same result was practically reached in *Choctaw Nation v. United States*, and *U. S. v. Choctaw Nation*, 119 U. S., 1 (1886).

for any person to engage in the laundry business without having first obtained the consent of the Board of Supervisors, unless the same be located in a building constructed either of brick or stone, because it did not prescribe a rule and conditions for the regulation of the use of laundry property to which all similarly situated might conform, and because it conferred a naked arbitrary power upon the Board of Supervisors to give or withhold consent, and made all those engaged in the business the tenants at will under the Board as to their means of living. It was declared that the rights of the petitioners were none the less because they were aliens and subjects of the Emperor of China.<sup>1</sup> In a later case although an Act of Congress provided for the punishment of conspirators to deprive the Chinese, residing within a State, of rights secured to them by treaty, it was decided that forcibly expelling them from their homes in the town in which they resided, was not an offence punishable under the statute, which was held to apply only to conspiracies affecting citizens in their enjoyment of the elective franchise and their civil rights as citizens.<sup>2</sup> In the *Chinese Exclusion Case*,<sup>3</sup> the Act of Congress prohibiting those Chinese laborers from re-entering the United States, who had departed before its passage with a certificate issued under a former Act granting them permission to return, was held to be valid, on the ground that even though the Act was in contravention of express treaty stipulations, it was not on that account invalid or to be restricted in its enforcement. Treaties were of no greater legal obligation than other Acts of Congress, and were subject to modification or repeal. The question whether the Government was justified in disregarding

<sup>1</sup> *Yick Wo v. Hopkins*, 118 U. S., 356 (1885).

<sup>2</sup> *Baldwin v. Franks*, 120 U. S., 678 (1886).

<sup>3</sup> *Chae Chan Ping*, 130 U. S., 581 (1889).

its engagements with another nation was held not to be one for the determination of the Court. The United States, through the action of its Legislative department, could exclude aliens from its territory, although no actual hostilities existed with the nation of which such aliens were the subjects, the power of excluding foreigners being an incident of sovereignty, hence the right to its exercise could not be granted away or restrained.

In the case of *Foster v. Kansas*,<sup>1</sup> it was held in confirmation of a former decision<sup>2</sup> that a State law prohibiting the manufacture and sale of intoxicating liquors was not repugnant to the Constitution of the United States,<sup>3</sup> and this was followed by the determination that legislation by a State, prohibiting the manufacture within her limits of intoxicating liquors to be there sold and bartered for general use as a beverage, did not necessarily infringe any right, privilege or immunity secured by the Constitution of the United States. Under the exercise of the police powers of the State it was competent for the Legislative department to determine primarily what measures were appropriate or needful for the protection of the public morals, the public health or the public safety, and the Fourteenth Amendment did not deprive the States of these powers, or impose restraint upon their exercise.<sup>4</sup>

<sup>1</sup> 112 U. S. 201 (1884).

<sup>2</sup> *Bartemeyer v. Iowa*, 18 Wallace, 129 (1873).

<sup>3</sup> See also *Beer Co. v. Massachusetts*, 97 U. S. 25 (1877).

<sup>4</sup> *Mugler v. Kansas*, 123 U. S., 623 (1887). See also *Bowman v. Chicago and Northwestern R. R. Co.*, 125 U. S. 465 (1887), in which it was held that a law of Iowa forbidding the bringing into the State from other States of any intoxicating liquors without a certificate, as therein required, was a regulation of commerce among the States, and was void as repugnant to the Constitution, such statute not being an inspection law, nor a quarantine or sanitary law, and therefore not a legitimate exercise of the police power of the State.

In the case of *Ex parte Spies*,<sup>1</sup> known as the case of the Chicago Anarchists, it was held that the first ten Amendments to the Constitution were not intended to limit the powers of the State Governments in respect to their own people, but simply operated on the National Government, and that where challenges to jurors for bias were disallowed, and the juror was peremptorily challenged and excused, and an impartial juror obtained in his place, the Constitutional right of the accused was maintained. The finding of the trial Court upon the issue of whether the jury was impartial, ought not to be set aside unless the error was manifest, and where the challenge was on the ground that the juror had formed an opinion, it must be made to appear clearly that upon the evidence the Court ought to have found that he had formed such an opinion that he could not in law be deemed impartial. It was also held that the objection that the defendants were foreign born, and had been denied by the trial Court rights guaranteed by treaty, could not be raised in the Supreme Court for the first time, the point not having been considered by the Court below; so, too, the objection that the defendants were not actually present in the State Court when sentence was pronounced, could not be made, if the record showed that they were present.<sup>2</sup>

The *Granger Cases* now claim attention. In *Munn v. The State of Illinois*<sup>3</sup> it was held, in an opinion by Chief Justice Waite, that under the limitations upon the legislative power of the States imposed by the Constitution of the United States, the

<sup>1</sup> 123 U. S. 131 (1887).

<sup>2</sup> See also *Brooks v. Missouri*, 124 U. S. 394 (1887) in which it was held that it must appear on the record that some right, title, privilege or immunity was specially set up or claimed in the State Court at the proper time, and in the proper way, and that the decision was against the right so set up or claimed.

<sup>3</sup> 94 U. S., 113 (1876).

Legislature of Illinois could fix by law the maximum of charges for the storage of grain in warehouses at Chicago, and other places in the State, it being a mere common law regulation of trade or of business. The act was not unconstitutional, and when private property was devoted to a public use it was subject to public regulation. From this judgment Justices Field and Strong dissented.

In the case of the *Chicago, Burlington and Quincy Railroad Company v. Iowa*<sup>1</sup> it was held that the railroad companies engaged in a public employment affecting the public interest, were subject to legislative control as to their rates of fare and freight unless protected by their charters, and that the Illinois statute to establish a reasonable maximum rate of charges for the transportation of passengers and freight on the different railroads of the State, was not void as being repugnant to the Constitution of the United States, or to that of the State. This opinion was also delivered by the Chief Justice, and dissented from by Justices Field and Strong. In further illustration of the doctrine, it was held in the *Railroad Commission Cases*<sup>2</sup> that the right of the State to impose reasonable limits upon the amount of charges by railroads for the transportation of property could not be granted away by its legislature, unless by express terms, or words equivalent in law.<sup>3</sup>

The most constant and strenuous discussion was maintained of the Commerce clause, indicating the enormous in-

<sup>1</sup>94 U. S., 155 (1876). Confirmed in *Dorr v. Beidelman*, 125 U. S., 680 (1887). The duties of railroad companies were stated in the *Express Cases*, 117 U. S., 1 (1885).

<sup>2</sup>116 U. S., 307 (1886).

<sup>3</sup>The principle of the *Granger Cases* was substantially modified, and, in the opinion of some of the Justices, practically overruled by *Chicago, etc., Railway Co. v. Minnesota*, 134 U. S., 418 (1889). *Minneapolis Railway Co. v. Minnesota*, *Ibid.*, 467 (1890).

crease and expansion of the business interests of the country. The first important decision affecting inter-State commerce, is that of *Welton v. The State of Missouri*,<sup>1</sup> in which it was held that where a license tax was required under the law of a State for the sale of goods brought from other States, while no similar tax was laid on sales of similar goods the product of the State itself, the law was unconstitutional and void. The power of Congress to regulate commerce was intended to prevent discriminations, and to cover property transported from other States, until it had mingled with and become a part of the general property of the country. It was protected even after it had entered a State from any burdens imposed because of its foreign origin. "The non-exercise by Congress of its power, its inaction upon this subject when considered in respect to commerce, is equivalent," said Mr. Justice Field, "to a declaration that inter-State commerce shall be free and untrammelled."

This was followed by *Henderson et al. v. The Mayor of the City of New York*,<sup>2</sup> in which Mr. Justice Miller elaborately reviewed all the cases of which *New York v. Miln* and the Passenger cases stood as examples, and reached the definite conclusion that although a State has authority to pass police regulations intended to secure protection against the consequences of a flood of pauperism, yet a statute which imposes a burdensome condition on a shipmaster, as a prerequisite to landing his passengers, with an alternative payment of a small sum of money for each one of them, was in reality a tax

<sup>1</sup>91 U. S., 275 (1875). Other instances of determinations against State legislation discriminating against the products of other States are to be found in *Guy v. Baltimore*, 100 U. S. 434 (1879); *Tiernan v. Rinker*, 102 U. S., 123 (1880); *County of Mobile v. Kimball*, *Ibid.*, 691 (1880); and the earlier case of *Woodruff v. Parham*, 8 Wallace, 123 (1868).

<sup>2</sup>92 U. S., 259 (1875).

on the shipowner for the right to land such passengers, and in effect a tax on the passenger himself, since the shipmaster made him pay it in advance as a part of his fare. Such a statute amounted to a regulation of commerce, particularly when applied to passengers from foreign countries, and was, therefore, unconstitutional and void. Although it might be conceded that there was a class of legislation which might affect commerce both with regard to foreign nations and between the States, in regard to which the laws of the State might be valid, in the absence of action under the authority of Congress on the same subject, yet this could have no reference to matters which were in their nature National, or which admitted of a uniform system or plan of regulation, and while the Court did not undertake to decide whether a State might or might not, in the absence of all legislation by Congress on the same subject, pass a statute strictly limited to defending itself against paupers, convicted criminals, and others of that class, yet it was of opinion that to Congress rightfully and properly belonged the power of legislating on the whole subject.<sup>1</sup>

A similar conclusion was reached in the case of *Chy Lung*

<sup>1</sup> Compare with this the able opinion of Mr. Justice Field in *County of Mobile v. Kimball*, 102 U. S., 691 (1880), declaring that State legislation affecting matters local in their nature, or intended to be mere aids to commerce, was not forbidden. The improvement of harbors, pilotage, beacons, buoys, etc., could be provided for by the States until Congress interfered. The same point was ruled in *Packet Co. v. Catlettsburg*, 105 U. S., 559 (1881). An interesting discussion by Mr. Justice Bradley is to be found in *Robbins v. Shelby County Taxing District*, 120 U. S., 489 (1886), setting aside as unconstitutional a license tax on "drummers," soliciting sales of goods on behalf of individuals or firms doing business in other States. But quarantine regulations were sustained in *Morgan v. Louisiana*, 118 U. S., 455 (1885). An ordinance as to washing and ironing in public laundries was sustained as a police regulation, *Barbier v. Connolly*, 113 U. S., 27 (1884). *Soon Hing v. Crowley*, *Ibid.*, 703 (1885).



v. *Freeman*,<sup>1</sup> where a California statute was stricken to the ground because the powers conferred upon State Commissioners were such as to bring the United States into conflict with foreign nations, and could only belong to the Federal Government. A mere police regulation, although limited in its terms, could not be extended so far as to prevent or obstruct classes of persons other than criminals and paupers from the right to hold personal and commercial intercourse with the people of the United States. The statute in this respect extended far beyond the necessity *in which the right, if it existed*, was founded, and invaded the right of Congress to regulate commerce with foreign nations, and was therefore void.

The State of New York again attempted legislation, but a tax on every alien passenger coming by vessel from a foreign country and holding the vessel liable for payment, was determined to be a regulation of commerce and void, even though the purpose was to aid the inspection laws of the State for the relief of paupers, the detection of criminals and the care of the sick.<sup>2</sup>

The time had come for Congress to regulate immigration, which was done by act of August 3, 1882, imposing on the owners of vessels bringing passengers from a foreign port into any port of the United States a duty of fifty cents for each passenger not a citizen. This was held to be a valid exercise of the power reposed by the Constitution in Congress to regulate commerce with foreign nations, and not a tax subject to the limitations imposed by that instrument. In fact it was a contribution to a fund designed to mitigate the evils incident to immigration.<sup>3</sup>

<sup>1</sup>92 U. S., 275 (1875).

<sup>2</sup>*People v. Compagnie Générale Transatlantique*, 107 U. S., 59 (1882).

<sup>3</sup>Head money cases, 112 U. S., 580 (1884).

Although the purpose of the statute was highly humane and beneficial to the poor and helpless immigrant and essential to the protection of the people in whose midst they were deposited, the statute was assailed. Mr. Justice Miller in defending it, in one of those sentences which illuminate a darkened subject, said: "We are now asked to decide that the power does not exist in Congress—which is to hold that it does not exist at all—that the framers of the Constitution have so worded that remarkable instrument that the ships of all nations, including our own, can, without restraint or regulation, deposit here, if they find it to their interest to do so, the entire European population of criminals, paupers and diseased persons without making any provisions to preserve them from starvation and its concomitant sufferings, even for the first few days after they have left the vessel." To this there could be but one reply. Freedom of transportation of passengers and freight between the States, it was said in *Gloucester Ferry Company v. Pennsylvania*,<sup>1</sup> implied exemption from all charges

<sup>1</sup> 114 U. S., 196 (1884). The cases illustrating the foregoing principles are numerous, but the following are selected as leading. *The Western Union Telegraph Co. v. Massachusetts*, 125 U. S., 530 (1887); *Pickard v. The Pullman Southern Car Co.*, 117 U. S., 34 (1885); *Philadelphia Steamship Company v. Pennsylvania*, 122 U. S., 326 (1886); in which it was held that a tax on gross receipts of a steamship company was void because the company was engaged in transporting passengers and freight between States and from foreign countries. *Wabash Railway Co. v. Illinois*, 118 U. S., 557 (1886), preventing discriminations in charges of a railroad company for a greater or shorter distance in which a statute intended to regulate or to tax the transportation of passengers or property from one State to another was held to be void. *Fargo v. Michigan*, 121 U. S., 230 (1886), in which it was determined that a State tax on gross receipts of a railroad company for the carrying of freight and passengers into and out of and through the State is a tax on commerce among the States and is void, the business itself being inter-State commerce and therefore not taxable under the guise of tax on business transacted within its borders. In *Sands v. Manistee River Improvement Company*, 123 U. S., 288 (1887), the internal commerce of a State was defined. In *Brown v. Houston*, 114 U. S., 622 (1884), it was said that the term "imports and exports"

except such as were imposed as compensation for the use of property employed, or for facilities afforded for its use or as ordinary taxes on the value of property.

The final result of all the cases was well stated by Mr. Justice Bradley in *Leloup v. Port of Mobile*,<sup>1</sup> where, after showing that reference was necessary to the fundamental principles stated and illustrated by Marshall, he declared: "No State has the right to lay a tax on inter-State commerce in any form whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it which belongs solely to Congress."

"But this exemption of inter-State and foreign commerce from State regulation, does not prevent the State from taxing the property of those engaged in such commerce located within the State as the property of other citizens is taxed, nor from

as used in the Constitution had no reference to goods transported from one State to another, and that a tax on personal property after it had come within the State was sustainable. In *Bowman v. Chicago, &c. Railway Co.*, 125 U. S., 465 (1887), a law of Iowa forbidding common carriers from bringing intoxicating liquors within the State was set aside as a regulation of commerce on the ground that it was not a quarantine or police regulation. "It has never been regarded," said Mr. Justice Matthews, "as within the legitimate scope of inspection laws to forbid trade in respect to any known article of commerce irrespective of its condition or quality merely on account of its intrinsic nature, and the injurious consequences of its use or abuse." Compare with this *Walling v. Michigan*, 116 U. S., 446 (1885), in which a State tax on an occupation discriminating against the introduction and sale of products of other States or against citizens of other States, was held to be void, and could not be sustained under the police power to regulate the sale of liquors. In *Smith v. Alabama*, 124 U. S. 465 (1887), a law requiring engineers of railroad trains to be examined and take out a license was sustained even as to those engaged in running trains between different States because the act did not burden or impede inter-State commerce but was intended to secure safety both to persons and property for the public.

<sup>1</sup> 127 U. S., 640 (1887).

regulating matters of local concern which may incidentally affect commerce such as wharfage, pilotage, taxation of property of a telegraph company within a State."

In the great case of the *Western Union Telegraph Company v. Texas*,<sup>1</sup> it was held that the telegraph was an instrument of commerce, and that telegraph companies were subject to the regulating power of Congress in respect to their foreign and inter-State business, and that the State could not place a specific tax on each message sent out of the State or sent by public officers on the business of the United States, although they might tax messages sent by private parties from one place to another exclusively within State jurisdiction.<sup>2</sup>

Under the same power of Congress to regulate commerce, the principles of the *Wheeling Bridge* case were affirmed in the great case of the *Brooklyn Bridge*, argued by the Hon. William H. Arnoux and Joseph H. Choate, in which it was held to be competent for Congress to authorize the construction of a bridge over a navigable water, and even though in fact it might be deemed an obstruction, in law it could not be so considered, because the obstruction had been made under proper authority.<sup>3</sup>

<sup>1</sup> 105 U. S., 460 (1881).

<sup>2</sup> This doctrine was in confirmation of that announced in *Pensacola Telegraph Company v. Western Union Telegraph Company*, 96 U. S., 1 (1887), in which it was said that a Telegraph Company occupied the same relation to commerce as a carrier of messages as a railroad company did as a carrier of goods, that both were instruments of commerce, and that their business was commerce itself; that though they did their transportation in different ways, and their liabilities were in some respects different, yet they were both indispensable to those engaged to any considerable extent in commercial pursuits. See also *Western Union Telegraph Co. v. Pendleton*, 122 U. S., 347 (1887). *Western Union Telegraph Co. v. Massachusetts*, 125 U. S., 530 (1888).

<sup>3</sup> *Miller v. Mayor of New York*, 109 U. S., 385 (1883). See also *Cardwell v. Bridge Co.*, 113 U. S., 205 (1884), confirming the doctrine of *Gilman v. City of Philadelphia*, holding that in the absence of legislation by Congress, a State might

In the *Virginia Coupon Cases*<sup>1</sup> it appeared that the State of Virginia had issued coupon bonds, and provided as a part of the right of the bondholders that the coupon should be receivable in payment of taxes, thus lodging in the hands of the creditor a self-executing remedy. It was held that this contract could not be impaired, and when a tax-collector to whom the coupons had been tendered, declined them, and distrained on the property of the taxpayer, he was personally liable in an action of detinue, and could not set up the later law of his State as a justification. It was further held not to be a suit against a State under the terms of the Eleventh Amendment; for as the Constitution had annulled the law of Virginia impairing the obligation of its contract, it was clear that the tax-collector was stripped of his official character, and was self-convicted of a personal violation of the plaintiff's rights, for which he must personally answer in damages. The doctrine of this case was confirmed in *Royall v. Virginia*,<sup>2</sup> where a license fee was required of an attorney for the practice of his profession payable under the laws of the State in coupons which were duly tendered and refused, and it was held that he might at once enter upon practice without license, and that any State law subjecting him to a criminal proceeding was void.<sup>3</sup>

An interesting distinction is presented by the two *Lottery Cases* between the effect of a charter by an ordinary legislative act and a Constitutional provision.

In the case of *Stone v. Mississippi*,<sup>4</sup> the police powers of the States were considered, and it was held that the Legis-

authorize the bridging of a navigable stream within its limits. Again confirmed in *Willamette Iron Bridge Co. v. Hatch*, 125 U. S., 1 (1887).

<sup>1</sup> 114 U. S. 270 (1884).

<sup>2</sup> 116 U. S. 572 (1885).

<sup>3</sup> Compare these decisions with *Hartman v. Greenhow*, 102 U. S., 72 (1880), and *Louisiana v. Jumel*, 107 U. S., 711 (1882)

<sup>4</sup> 101 U. S., 814 (1879).

lature, by chartering a lottery company for twenty-five years, could not defeat the will of the people expressed in a Constitutional Amendment (adopted one year later than the charter) forbidding lotteries, lotteries being within the exercise of the police powers of the State, which extended to all matters affecting the public health or the public morals. It was not competent for the Legislature to make a contract by charter by which the State bargained away her police power. The opinion was delivered by Chief Justice Waite. The Mississippi Lottery was thus destroyed.

The Louisiana Lottery was sustained in the case of the *City of New Orleans v. Houston*,<sup>1</sup> in an opinion delivered by Mr. Justice Matthews, in which it was shown that, the grant of the charter of the Company being contained in the Constitution of the State, the Legislature, acting under that Constitution, could not contravene it, although the subject matter of such contract might have been embraced within the police powers of the State, the effect of the Constitutional provisions being to establish a contract binding upon the State for the specified period.

The career of Chief Justice Waite fitly terminated with the great *Telephone Cases*,<sup>2</sup> in which the claims of Alexander Graham Bell, as the inventor of this marvellous instrument of business communication, were sustained against all who claimed the distinction of priority of invention and sought to reap the golden harvest of profit which had accrued.

Several changes in the *personnel* of the Court had taken place during the period reviewed which it is our duty to notice.

Upon the death of Mr. Justice Clifford, Horace Gray,

<sup>1</sup> 119 U. S. 265 (1886).

<sup>2</sup> 126 U. S. 1 (1888).





Robert M. La Follette



then the Chief Justice of Massachusetts, was appointed in his place, and duly commissioned upon the 20th of December, 1881. He is a native of Boston, and was born on the 24th of March, 1828, graduated from Harvard University in 1845, enjoyed the advantages of extensive travel in Europe, and returned to Harvard to enter its Law School. He subsequently read law under the direction of Judge Lowell, and obtained admission to the bar in 1851. In early life he identified himself with the founders of the Free Soil party, but the practice of his profession absorbing his attention, his subsequent connection with politics has been but nominal. He soon won a prominent position at the bar, conducting many important cases, and in 1854 was appointed Reporter of Decisions of the Supreme Judicial Court of Massachusetts, a position which he held until 1861, publishing sixteen volumes. While thus engaged he formed a law partnership, in 1857, with Judge Hoar, and continued in the discharge of active professional engagements and the enjoyment of an increasing practice until he was appointed by Governor Andrew, on the 24th of August, 1864, an Associate Justice of the Supreme Court of the State. In 1873 he became Chief Justice, as the successor of Chief Justice Chapman.

As a State Judge he delivered many interesting opinions on a great variety of subjects, the most important of which concerned the exemption of the United States from suit, the law of charities, ancient grants and boundaries, the effect of war upon private rights, the annexation of towns, and the liability of municipal corporations to private action, the Constitutionality of confirmatory statutes, contracts *ultra vires*, and the conflict of laws. Uniting to natural ability an unusual and thorough knowledge of law, acquired by careful study and ripened by experience, his accession to a place

upon the Supreme Bench of the Union was not only greeted with applause and commendation, but was recognized as a striking feature in a professional career, which resembled, in its steady rise and expansive progression, the promotion of an English lawyer to the most exalted honors. In character as well as learning, in age and robust vigor, in a majestic presence, he was fit for the work before him. As a presiding Judge he had been strict and punctilious—a trait which, although uncomfortable to the slovens and sluggards of the Bar, had proved an incentive to younger men to acquire technical correctness and precision. Anxious himself to learn, ambitious to preserve the precious stores of knowledge, and stimulating others to emulate his example, honorable, fearless and competent, he has become one of the most trusted guardians of the interests of justice.

In the Supreme Court his views have been chiefly in support of a high exercise of Federal authority, and he it was who, in the famous case of *Juillard v. Greenman*—establishing the Constitutionality of the Legal Tender Acts in time of peace—placed the cap-stone upon the majestic column representative of National Power, attaining a dizzy height to which even the boldest architect of the Constitution had never raised his eyes. Since then, whether it be the novelty requisite to support a patent, the status of Indians, the relations of guardian and ward, the conflict of laws, the Constitutionality of mill acts, the interpretation of wills, the nature of infamous crimes, the true meaning of contracts of shipment, the powers of courts martial, the exemption of the property of the United States from taxation by a State, the Civil law of Louisiana, the distinction between capital and income, the original jurisdiction of the Supreme Court over suits by a State, or the jurisdiction of the United States over the Guano Islands—

that called forth a judicial utterance or the entry of a final decree, he has in each instance expressed himself in terms dignified, firm and impressive, and supported his conclusions by reasons well sustained by authority. His dissenting opinions are but few in number, the best known of which are in the Arlington case,<sup>1</sup> and the Original Package case of *Leisy v. Hardin*.<sup>2</sup>

Upon the resignation of Mr. Justice Hunt, Samuel Blatchford, of New York, was commissioned as an Associate Justice upon the 22d of March, 1882. His grandfather, Samuel Blatchford, was an English dissenting minister, who came from Devonshire to the United States in 1795, and after several changes of residence established himself at Lansingburg in the State of New York. His father, Richard Milford Blatchford, was a native of Stratfield, Connecticut, a graduate of Union College, subsequently a school teacher, and still later a successful member of the bar of New York City, the financial agent as well as counsel of the Bank of England, and still later counsel for the Bank of the United States. He was also a member of the lower house of the Legislature of New York, and at the outbreak of the Civil War became a member of the Union Defence Committee of the city of New York, and was appointed by President Lincoln, in connection with John A. Dix and George Opdyke, a member of a committee, charged with the disbursement of Government moneys for the purpose of procuring soldiers for the Union Army. In 1862 he was appointed Minister Resident to the States of the Church, and remained in Rome until August, 1863. He was an intimate personal friend of Daniel Webster, and one of the executors of his will. He died at Newport, Rhode Island, in

<sup>1</sup> United States v. Lee, 106 U. S., 196 (1882).

<sup>2</sup> 135 U. S., 100 (1889.)

1875. The mother of Mr. Justice Blatchford was Julia Ann, daughter of John P. Mumford, Esq., of New York City.

Their son, Samuel Blatchford, was born in the city of New York on March 9th, 1820, was educated at a boarding school at Pittsfield, Massachusetts, and subsequently at the school of William Forrest, a well-known teacher in the city of New York, and at the grammar school of Columbia College, then under the superintendence of Charles Anthon, LL.D., Jay Professor of Greek and Latin. He entered Columbia College at the age of thirteen, and graduated in 1837, at the age of seventeen. He then became private secretary to William H. Seward, who had been elected Governor of New York, and held the position until his resignation in 1841, when he was appointed Military Secretary on the staff of the Governor. In the following year he was admitted to the bar, and practiced his profession in the city of New York, in connection with his father and his uncle, E. H. Blatchford, until November, 1845, when he removed to Auburn, and became the law partner of Governor Seward and Christopher Morgan. In 1854, removing to the city of New York, he formed a copartnership in connection with Clarence A. Seward and Burr W. Griswold, under the firm name of Blatchford, Seward and Griswold. Upon the 3rd of May, 1867, he was appointed District Judge of the United States for the Southern District of New York in the place of Samuel R. Betts, who had resigned. His opinions in the District Court are reported in the first nine volumes of Benedict's District Court Reports, and his opinions in the Circuit Court, while District Judge, are reported in volumes 5 to 14 of Blatchford's Circuit Court Reports. On the 4th of March, 1878, he was appointed Circuit Judge of the Second Judicial Circuit in the place of Alexander S. Johnson, deceased, and his opinions, since March, 1882, in the



*Saint Blaise*



Circuit Court, are reported in volumes 14 to 24 of Blatchford's Circuit Court Reports, and in the "Federal Reporter." In 1867 the degree of LL.D. was conferred upon him by his Alma Mater, and he was chosen Trustee, which position he still holds. In 1852 he commenced the publication of his series of Reports of the Circuit Courts of the United States within the Second Circuit, and has published twenty-four volumes of such Reports. As an Admiralty Judge he ranks among the foremost in the land, having considered and determined questions as to the rules of navigation on the high seas, as to excessive speed of steamers on the high seas in a fog, as to whether damage to a cargo by rats is a peril of the sea, as to process of foreign attachment in admiralty, as to re-insurance of a charter party, as to jurisdiction in admiralty of damages not done on the water, and as to the liability to a seizure in admiralty, for a maritime tort, of a steam-tug belonging to a municipality and employed exclusively in public duties. As a patent lawyer he is clear-headed and sensible, determining, among other notable cases, the validity of letters patent for insulating telegraph wires by gutta-percha, and the liability of a common carrier for infringing a patent, when it carried the infringing article, which was to be sold at its destination for use. Besides these he adjudicated numerous questions in bankruptcy, questions of copyright and libel, the power of the President to cancel a pardon before it had been delivered to the prisoner, the legality of the Brooklyn Bridge as a structure suspended over navigable waters, the validity of a statute of New York discriminating in rates of wharfage in favor of canal-boats of the State, and many kindred controversies. Fully equipped by such a varied judicial experience in the busiest Circuit of the nation for dealing successfully

with the complex questions of Federal jurisprudence, he brought to the Supreme Bench not only ample learning, but an unusual degree of ready ability to meet problems as they arose. His appointment was received with hearty and universal approval. His judicial style is clear, but hard and dry, lacking compression and nervous energy, but it is vain to expect the *verba ardentia* when discussing the liens which may be made by a Court to take precedence of the lien of a railroad mortgage, or when a collector of customs will not be personally liable for a tort committed by his subordinates. His accuracy, care, impartiality and firmness are alike conspicuous, whether he states the law relating to the re-issue of patents, or subjects the most powerful railroad corporation in the land to the provisions of a State Constitution.

The successor of Mr. Justice Woods was Lucius Quintus Cincinnatus Lamar, of Mississippi, who was duly commissioned as an Associate Justice upon the 16th of January, 1888. His father, who bore the same name, was himself an eminent jurist, a Judge of the Supreme Court of Georgia and an eloquent speaker. Of him it was said by a member of the highest Court in that State: "From the day of his election to that of his lamented death, he discharged the duties of his office with signal ability and with public applause, which few in judicial stations have had the good fortune to receive." His distinguished son was born upon the 17th of September, 1825, in Putnam County, Georgia, and upon his father's death was taken to Oxford, Mississippi, where he received his early education. He was a graduate of Emory College, Georgia, in 1845, and having studied law in Macon, was admitted to the bar in 1847. He then returned to Oxford, and held the place of Adjunct Professor of Mathematics in the University of Mississippi, remaining there but





L. D. C. Lamar



a few years, when he resigned, and resumed the practice of the law in Covington, Georgia. Whilst in excellent business for so young a man, he was elected to the Georgia Legislature in 1853, but the following year returned to Mississippi, and settled upon his plantation in Lafayette. In 1857 he was elected a member of Congress as a Democrat, and served until 1860, winning distinction, when he withdrew from Congress to take part in the Secession Convention of Mississippi, and subsequently entered the Confederate Army as Colonel of the Nineteenth Mississippi Regiment. He took an active part in many of the engagements of the Army of Northern Virginia, but was compelled to retire on account of ill health. He was then sent as Commissioner to Russia; but on arriving in Europe, in 1863, circumstances had so changed that the success of his mission was not a possibility. At the close of the war he returned to Mississippi, and in 1866 held the position of Professor of Political Economy and Social Science in the University of that State. In 1867 he was transferred to the Chair of Law, and finally returned to the bar.

In 1872, though engaged in a large practice, he was elected to Congress, and his disability on account of having borne arms against the Union was removed after his election. For the first time in many years a Democratic House of Representatives assembled, and Mr. Lamar, being chosen to preside over the Democratic Caucus, delivered an able and noteworthy address, outlining the policy of his party. His leadership was marked and masterly, and fixed the gaze of the nation. In 1874 he was re-elected, and spoke on critical occasions with power and effect. In 1876 he became a Senator of the United States, sharing in the debates only on important questions, and then, maturely prepared, as he never failed to be, his arguments were sustained by a

closeness of logic and an eloquence of style which won for him the attention and respect of both parties. He insisted that, as integral members of the Federal Union, the Southern States have equal rights with those of the North, whilst they were bound by both duty and interest to look to the general welfare and to support the honor and credit of a common country. He was also a zealous friend of public improvements, and especially of the Mississippi River and the Texas and Pacific Railroad. He exercised great independence of thought, and at one time, when instructed by the Legislature of his State to vote upon the currency question against his convictions, he refused to obey, boldly appealed to the people, and was triumphantly sustained. Upon the 5th of March, 1885, he was appointed Secretary of the Interior in the Cabinet of President Cleveland, and delivered many important opinions affecting the public lands.

As a jurist, he has taken high rank, his opinions being marked by scholarship and careful study of principles and of cases. One of his colleagues, upon being asked whether he had met the expectation of his friends, replied: "Fully. Mr. Cleveland made no mistake in appointing him. Whatever doubts existed as to his fitness for the Supreme Bench growing out of his long political and parliamentary career and absence from the active practice of his profession, have wholly disappeared. This will be conceded by all who have read his opinions. He has sound judgment, a calm temperament and a strong sense of justice. He possesses the judicial faculty in a very high degree. He takes broad, comprehensive views of legal and Constitutional questions, and states his conclusions with unusual clearness and force, and in language most aptly chosen to express the precise idea of his mind. His brethren are greatly attached to him." Upon another occa-

sion one of his judicial associates remarked: "Your differentiation of cases where a State may and may not be sued is the best I have seen. The case seemed to me a difficult one, and I should not have suspected that you did not enjoy writing opinions. This is excellent."<sup>1</sup> Of the same case the oldest Justice now upon the bench wrote as follows: "I think that your summary of the Constitutional principles applicable to the reciprocal relations of Article I, Section 10, and the Eleventh Amendment of the Constitution, is so clear that it would suffer from abridgment," while of a recent case involving the question of contingent or prospective profits, it was said: "Your annunciation of the principles applicable to the question of profits is unusually clear and concise,"<sup>2</sup>

The logical power of Mr. Justice Lamar, his striking talents as a rhetorician, his clearness of vision in detecting the true point in controversy, and his tenacious grasp upon it through all the involutions of argument, his familiarity with adjudged cases, his well-defined conception of the nature of the General Government and the distribution of its powers under the Constitution are best displayed in his dissenting opinion in *In re Neagle*, in which, unswayed by horror or resentment at the atrocious attempt to assassinate Mr. Justice Field, he insisted that before jurisdiction of the crime of murder could be withdrawn from the tribunals of the State where the act was perpetrated into the Federal Courts, it was necessary to show some law, some statute, some Act of Congress which could be pleaded as an authoritative justification for the prisoner's act, and that no implied power existed in the President or one of his subordinates to substitute an order or direction of his own, no matter how lofty the motive or commendable the result.

<sup>1</sup> *Pennoyer et al. v. McConnaughy*, April 20, 1891.

<sup>2</sup> *Howard et al. v. The Stillwell and Bierce Manufacturing Company*, March 16, 1891.

## CHAPTER XX.

THE COURT COMPLETES THE WORK OF THE FIRST CENTURY OF ITS EXISTENCE:  
 1888-1890: DEATH OF CHIEF JUSTICE WAITE: APPOINTMENT OF MELVILLE W.  
 FULLER AS HIS SUCCESSOR: SKETCHES OF CHIEF JUSTICE FULLER AND OF AS-  
 SOCIATE JUSTICES BREWER AND BROWN: GENERAL CHARACTER OF CASES CON-  
 sidered: INTER-STATE COMMERCE: *LEISY v. HARDIN*, THE ORIGINAL PACKAGE  
 CASE: POLICE REGULATIONS AS TO LIQUOR LAWS: INDEPENDENCE OF EXECU-  
 TIVE OFFICERS: RIGHT OF DEBTOR TO INSURE HIS LIFE: POWER OF COURTS TO  
 PUNISH CONTEMPTS: INDIAN TRIBES: CONSTITUTIONAL CONTROL OF RAILROADS:  
 MORMON CHURCH CASE: SUITS AGAINST A STATE: EX POST FACTO LAWS:  
 CRUEL AND UNUSUAL PUNISHMENTS: MODIFICATION OF GRANGER CASES: EX  
 PARTE TERRY: IN RE NEAGLE: PEACE OF THE UNITED STATES: TELEPHONE  
 CASES: THE BAR OF THE SUPREME COURT: CONCLUSION.

THE death of Chief Justice Waite occurred on the 23rd of March, 1888, and Melville Weston Fuller, of Illinois, was duly commissioned as his successor upon the 20th of the following July.

The ancestors of Mr. Fuller were among the earliest and sturdiest settlers of New England. One of them was the celebrated Thomas Weld, a graduate of Cambridge University, England, who became the first minister of the first church of Roxbury, now a part of Boston, and was known as the "Preacher" when Eliot, the Apostle, was the "Teacher." His grandson was the famous Habijah Weld, who is described in Edwards' "Travels in New England" as an orator of great virtue and power and "a perfect Boanerges in the pulpit." His daughter, Hannah, married the Rev. Caleb Fuller, a graduate of Yale, and a grandson of that distinguished citizen of Dedham who had married the sister of the proscribed patriot and bold captain, Daniel Fisher, who in 1682 was the



W. W. Kelley





Speaker of the General Court, and was prosecuted by the British government for sedition. Another daughter married an ancestor of the late Chief Justice Shaw, of Massachusetts, so that the rugged qualities of leadership which characterized the old Puritan preacher, have been honorably perpetuated by his descendants. The grandfather of the present Chief Justice of the United States was the Hon. Henry Weld Fuller, a native of Middletown, a classmate in Dartmouth College of Daniel Webster, subsequently a lawyer of renown, and at his death a Judge of Probate in Kennebec County, Maine. His father was Frederick Augustus Fuller, a graduate of the Harvard Law School, and a sound lawyer, whose advice was much sought after. His mother was Catharine Weston, a daughter of the Hon. Nathan Weston, an eminent Judge of the Supreme Court of Maine, and for many years Chief Justice of the State. Descended on both sides from a race of lawyers, inheriting the well-trained faculties, as well as the traditions, of a long line of jurists and orators, it is not surprising to find in the most distinguished of its members ample legal knowledge, forensic skill, stirring eloquence, scholarly habits and convincing logic,—qualities which made him pre-eminent at the Bar of the great West, and, added to his professional experience, have fitted him to succeed the lamented Waite.

Melville W. Fuller was born in Augusta, Maine, on the 11th of February, 1833. He entered Bowdoin College at an early age, and graduated in 1853. He began the study of the law almost immediately under the direction of his uncle, George M. Weston, at Bangor, and also attended a course of lectures at the Harvard Law School. In 1855 he formed a legal copartnership with his uncle, Benjamin A. G. Fuller, at Augusta, with whom he was also associated as editor of "The

Age," a leading Democratic paper. In the following year he became President of the Common Council of his native town, and also served as City Solicitor. Although meeting with remarkable success and enjoying the most enviable prospects, he resolved, with the enterprising spirit of a pioneer, upon a removal to the West, and towards the close of the year 1856 established himself in Chicago. Here he was engaged in active practice for thirty-three years, rising gradually to the highest rank, and taking part in all the important arguments of the time. In the famous *Cheney* case he greatly distinguished himself, defending the Bishop before an ecclesiastical council against a charge of canonical disobedience, and astonishing his hearers by his extraordinary knowledge of ecclesiastical law, and his familiarity with the writings of the Fathers of the Church. His argument of the same case before the Supreme Court of Illinois has been pronounced a masterpiece of forensic eloquence and skill.

His practice was of the most varied and general character, embracing cases in every kind of tribunal, both State and National. His first case before the Supreme Court of the United States was that of *Dows v. Chicago*,<sup>1</sup> an attempt to restrain by bill the collection of a tax upon shares of the capital stock of a bank; the first case that he argued in person was that of the *Traders' Bank v. Campbell*,<sup>2</sup> involving the interesting question of when a judgment against a bankrupt constitutes a fraudulent preference. In the first case heard by Chief Justice Waite, that of *Tappan v. The Merchants' National Bank of Chicago*,<sup>3</sup> he argued, though unsuccessfully, that the power of a State to tax stockholders in a National bank did not extend to non-resident stockholders,

<sup>1</sup> 11 Wallace, 108 (1871).

<sup>2</sup> 14 Wallace, 87 (1872).

<sup>3</sup> 19 Wallace, 490 (1874).

while his last case, which was not decided until after he had taken his seat upon the bench, was that of *Railway Companies v. The Keokuk Bridge Co.*,<sup>1</sup> in which it was held that a contract made by the President of a railroad company in its behalf to pay certain sums for the use of a railway bridge across the Mississippi River between Illinois and Iowa, the terms of which had been communicated to the Directors and stockholders, and not disapproved by them within a reasonable time, was not *ultra vires*, but was binding upon the corporation.

His participation in politics has been slight. In 1861 he was a member of the State Constitutional Convention of Illinois, and in 1862 he served for a single term in the Legislature. He has been chosen as a delegate to the Democratic National Conventions of 1864, 1872, 1876 and 1880.

A ripe scholar in the classics, familiar with several European languages, diligent in research, fluent in speech and ready with his pen, he has attained a high reputation as an orator, and has delivered many notable addresses. Of these the most important was in commemoration of the Inauguration of George Washington as First President of the United States, delivered before the two Houses of Congress on the 11th of December, 1889;<sup>2</sup> an oration characterized by ardent patriotism, descriptive power, historic spirit and lofty eloquence.

The Northwestern University in 1884, and Bowdoin in 1888, conferred upon him the degree of LL.D. He presides with dignity and grace over the deliberations of the tribunal, and is known to the Bar as a man of amiable disposition and generous impulses.<sup>3</sup>

<sup>1</sup> 131 U. S., 371 (1889).

<sup>2</sup> Appendix to 132 U. S., 707.

<sup>3</sup> Sketch of Chief Justice Fuller, "The Green Bag," No. 1, Vol. I, p. 1; Chicago "Legal News," Vol. XX, p. 291; Appleton's "Cyclopædia of American Biography;" private letters.

The death of Mr. Justice Matthews upon the 22d of March, 1889, created a vacancy which was filled by the appointment, in December of the same year, of David Josiah Brewer, who was duly commissioned upon the 6th of January, 1890. He was born in Smyrna, Asia Minor, on the 20th of June, 1837, and was the son of the Rev. Josiah Brewer and Emilia A., a sister of David Dudley, Stephen J., and Cyrus W. Field. His parents were missionaries to the Levant, and returned to this country when he was still an infant. His early education was received in the schools of Connecticut, and in 1851 he entered Wesleyan University at Middletown, where his father then lived, but afterwards went to New Haven, and graduated from Yale College in 1856, with high honors. Upon leaving Yale he entered the law office of his uncle, David Dudley Field, in New York City, in which he spent one year as a student, and then completed his legal studies in the Albany Law School, from which he graduated in the class of 1858. In the Fall of that year he went West, and after a residence of a few months in Kansas City started up the Arkansas Valley for Pike's Peak and Denver. Returning to Kansas in June, 1859, after a short visit home he established himself in Leavenworth, and resided there until removing to Washington in January of 1890.

In 1861 he was appointed United States Commissioner. In the following year he was elected Judge of the Probate and Criminal Courts of Leavenworth County. In 1864 he was elected Judge of the District Court for the first judicial district of Kansas, and in 1868 served as County Attorney. Being interested in educational matters he became a member of the Board of Education of Leavenworth City in 1863, and in 1865 became President of the Board, and still later was Superintendent of the public schools. During 1862 and 1863 he was secre-



D. J. Brewer



tary of the Mercantile Library Association of Leavenworth, and its President in 1864. In 1868 he became President of the State Teachers' Association. In 1870 he was elected a Justice of the Supreme Court of Kansas, was re-elected in 1876, and again in 1882. In March, 1884, he was appointed Judge of the Circuit Court of the United States for the Eighth Circuit, and in parting from his former associates of the State Bench, wrote an affectionate letter of farewell, expressing his appreciation of the assistance he had received from his colleagues and his regret upon parting from them.

While a State Judge he wrote an opinion dissenting from the majority of the Court upon the question of the power of a municipality to issue bonds in aid of railroads,<sup>1</sup> and wrote the opinion of the court ruling that women were eligible to the office of County Superintendent of Public Instruction,<sup>2</sup> since which time the State has had from one to a dozen women Superintendents in the various counties. In the Prohibitory cases<sup>3</sup> he sustained the proceedings by which the Prohibitory Amendment was adopted as a part of the State Constitution, and in the Liquor cases<sup>4</sup> explained and sustained the statutes which were intended to carry it into effect. As a Circuit Judge he ruled that a brewery built when the law sanctioned and protected the manufacture of beer, and which was constructed with special reference to such manufacture, and which could not, without great loss, be adapted to any other purpose, could not, after a change of policy in the State, by which the manufacture of beer was prohibited, be stopped from running, until the amount of the loss had been estimated and paid to

<sup>1</sup> State *ex rel.* v. Nemaha County, 7 Kansas, 549 (1871).

<sup>2</sup> Wright v. Noel, 16 Kansas, 601 (1876).

<sup>3</sup> 24 Kansas, 700 (1881).

<sup>4</sup> 25 Kansas, 751 (1881).

the proprietor,<sup>1</sup> a judgment which was subsequently reversed by the Supreme Court of the United States.<sup>2</sup> He also sustained the title to the Maxwell Land Grant, the largest private land grant which has ever been sustained in this country,<sup>3</sup> a judgment which was afterwards affirmed by the Supreme Court.<sup>4</sup> He also enjoined, upon the petition of certain railroad companies, the Railroad Commissioners of the State of Iowa from putting into force a schedule of rates so low that the earnings of the roads thereunder would not be sufficient to pay operating expenses and interest on their bonds, and was the first to challenge the dicta in the Granger cases as to the unlimited power of the State Legislature over rates, a proposition which has since been sustained by the Supreme Court.

His perceptive faculties are quick and he works with facility and ease. The duties of his various judicial positions have been discharged with untiring industry, acknowledged ability and impartiality. He is energetic in the dispatch of business and remarkable for executive ability. His social qualities are of a high order, and he is renowned for his skill as a *raconteur*. Although urged to become a candidate for the vacancy created by the death of Mr. Justice Matthews, he declined, saying "The office was not one to be contested, being too high and sacred;" but his eminent qualifications were called to the attention of the President, and it has been widely reported that his courtesy and generosity towards his chief competitor, Judge Henry B. Brown, of Michigan (now his associate upon the bench of the Supreme Court of the United States), who had been his classmate at Yale, so impressed the

<sup>1</sup> *State v. Walruff*, 26 Federal Reporter, 178 (1886).

<sup>2</sup> *Kidd v. Pearson*, 128 U. S. (1888).

<sup>3</sup> *United States v. Maxwell Land Grant Co.*, 26 Federal Reporter, 118 (1886).

<sup>4</sup> 121 U. S. 325 (1887).







Henry B. Brown

Executive with his fairness, as to secure his promotion. In character, temperament, learning, industry and experience, he has proved himself to be a worthy member of his distinguished family.

Through the death of Mr. Justice Miller, upon the 14th of October, 1890, a vacancy occurred which was filled by the appointment of Henry B. Brown, of Michigan, who was commissioned upon the 29th day of December, 1890. At the time of his appointment he was Judge of the United States District Court for the Eastern district of Michigan, and his is the only instance in recent times of the promotion of a District Judge to the highest judicial position in the land.

He was born in Lee, Massachusetts, upon the 21st of March, 1836. His father was a manufacturer, and his mother was a woman of exceptional strength of character. He was educated at Yale, from which he graduated in 1856, with Chauncey M. Depew and his present associate, Mr. Justice Brewer, as classmates. At the close of his college course he spent a year in Europe studying languages and traveling extensively on the Continent. Upon his return he pursued a course of study at the Law School at New Haven, but received his degree from the Harvard Law Department. In 1859 he went to Detroit, and there entered the office of a prominent law firm, in which he continued until April, 1861, when he was appointed Deputy United States Marshal and Assistant District Attorney. He held the latter office until 1868, when Governor Crapo appointed him to fill a vacancy in the Wayne Circuit Court, the highest court in the City of Detroit, with law and chancery jurisdiction. Returning to the practice of his profession, he formed a partnership with the late J. S. Newberry and Ashley Pond. In 1875 he was appointed by President Grant District Judge of the United States, succeeding Judge J. W. Longyear.

His practice was almost exclusively in the United States Courts, and his knowledge of admiralty proceedings, together with his familiarity with the domain of criminal law made him eminent in those branches.<sup>1</sup>

As an admiralty Judge he has tried a far larger number of cases than any other Judge upon the Bench, and is a recognized authority in this particular field. A scholar by taste and lifelong habit, he has delivered several addresses, a notable one being a paper upon "Judicial Independence," read before the American Bar Association at its Twelfth Annual meeting,<sup>2</sup> in which he reviewed and criticised the statutes in many of the Southern and Western States which were intended to secure the unbiased opinion of juries upon facts, and an easy and accurate settlement of bills of exception, "but the effect of which was to shear the judge of his proper magisterial functions, and to reduce him to the level of a presiding officer, or the mere mouth-piece of counsel." In this paper he takes high ground and reviews the history of the Judiciary from its earliest days to the present time, contending for a tenure of office which would remove the Judges from temptation and as far as possible from suspicion. His style is clear, emphatic and at times picturesque.

Under the presidency of Mr. Fuller as Chief Justice, the Court has extended, strengthened and illustrated the system

<sup>1</sup> His most important decisions are in *Ex parte* Thompson, 1 Flippin, 507 (1876); National Bank of Paducah, 2 *Ibid.*, 61 (1877); The Manitoba, 2 *Ibid.*, 241 (1878); Phillips v. Detroit, 4 Banning and Arden Patent Cases, 347 (1879); Burton v. Stratton, 12 Federal Reporter, 696 (1882), The James P. Donaldson, 19 *Ibid.*, 264 (1883); The Alberta, 23 *Ibid.*, 807 (1885); United States v. Clark, 31 *Ibid.*, 710 (1887); *Ex parte* Byers, 32 *Ibid.*, 404 (1887); Saginaw Gas Light Co. v. Saginaw, 28 *Ibid.*, 529 (1886); Navigation Co. v. Insurance Co., 26 *Ibid.*, 596 (1886); Brush Electric Co., 43 *Ibid.*, 533 (1890); Cope v. Cope, 137 U. S. 682 (1891).

<sup>2</sup> Report of the Twelfth Annual Meeting of the American Bar Association held at Chicago, Illinois, 1889, p. 266.

established under his predecessors. Although no novel doctrines have been introduced, nor has there been any departure from well beaten paths, yet a noticeable expansion of Federal power occurred in the establishment of the doctrine of a Peace of the United States, and the declaration that there existed an implied authority on the part of the Executive to protect the Federal Judges against violence whenever there was a just reason to believe that they would be exposed to personal danger while executing the duties of their office. At the same time, in the interpretation of the Commerce clause, high water mark was reached. The work of the Court has been performed with loyalty to the Constitution, fidelity to the principles of Nationality, and a close, but not servile, adherence to former well-considered decisions. Legal maxims have been applied to a vast and ever increasing mass of business with a degree of skill and intelligence which are worthy of the past history of the tribunal.

In the *Western Union Telegraph Company v. Commonwealth of Pennsylvania*,<sup>1</sup> the Chief Justice affirmed the doctrine that a Commonwealth was not entitled to recover taxes upon telegraph messages except in respect to those transmitted wholly within the State, the distinction being drawn between messages transmitted from points within to points without the State, which were elements of inter-State commerce, and, therefore, not subject to Legislative control; but messages between points entirely within the State were elements of internal commerce, solely within the limits and jurisdiction of the State, and, therefore, subject to its taxing power.<sup>2</sup>

In *McCall v. California*,<sup>3</sup> in an opinion by Mr. Justice

<sup>1</sup> 128 U. S. 39 (1888).

<sup>2</sup> Compare *Western Union Telegraph Co. v. Texas*, 105 U. S. 460 (1881); *Ratterman v. Western Union Telegraph Co.* 127 U. S. 411 (1889).    <sup>3</sup> 136 U. S. 105 (1890).

Lamar, all the cases were reviewed, and it was declared that no burden could be placed by States on commerce with foreign nations, or among the several States, nor could any burden be imposed on the instruments or subjects of commerce, nor a license fee be exacted from persons in commercial pursuits.<sup>1</sup> And in *Asher v. The State of Texas*, a law imposing a tax on commercial drummers, and requiring them to obtain licenses was held to be void as applied to citizens of other States soliciting trade.<sup>2</sup>

But the most memorable opinion delivered by the Court since the days of Taney, when the same question was discussed, and one which attracted universal attention and provoked some excitement, was that of the celebrated "Original Package Case" of *Leisy v. Hardin*,<sup>3</sup> in which the decision in *Peirce v. New Hampshire*<sup>4</sup> was distinctly overruled, it being held that a statute of a State which prohibited the sale of any intoxicating liquor, except for certain specific purposes under a license from a county court, was, as applied to a sale by the importer in the original packages or kegs, unbroken or unopened, of liquors manufactured and brought in from another State, unconstitutional and void, Chief Justice Fuller reviewing every case relating to the Commerce clause from the time of *Gibbons v. Ogden* and *Brown v. Maryland*, to the present day.

It was shown that in Congress was vested the power to prescribe the rule by which commerce with foreign nations and among the several States was to be governed,—a power

<sup>1</sup> To same effect see *Minnesota v. Barber*, 136 U. S. 313 (1890). In *Home Insurance Co. v. New York*, 134 U. S. 594 (1890) the power of a State to tax the corporate franchise, or business of all corporations, foreign or domestic, doing business in a State, measured by the extent of the dividends of the corporation in a current year, was upheld.

<sup>2</sup> 128 U. S. 129 (1888).

<sup>3</sup> 135 U. S. 100 (1890).

<sup>4</sup> 5 Howard, 504. (1847).

complete in itself, acknowledging no limitations other than those prescribed in the Constitution; a power co-extensive with the subject on which it acts, which cannot be stopped at the external boundary of a State, but must enter it, and be capable of authorizing the disposition of those articles which it introduced, so that they might become mingled with the common mass of property within the State. It was, therefore, asserted that while, by virtue of its jurisdiction over persons and property within its limits, a State might provide for the security of the lives, limbs and comfort of persons, and the protection of property so situated, yet a subject matter which had been confided exclusively to Congress was not within the jurisdiction of the police power of the State unless placed there by Congressional action.

After examining the decision of Chief Justice Taney in the New Hampshire case, and conceding the weight properly to be ascribed to the judicial utterances of that eminent jurist, Chief Justice Fuller felt himself constrained to say that the distinction between subjects in respect to which there can be of necessity only one system or plan of regulation for the whole country, and subjects local in their nature, and, so far as relating to commerce, mere aids rather than regulations, did not appear to him to have been sufficiently recognized by Taney in arriving at the conclusions he announced. The later authorities had distinctly overthrown the authority of that case. After examining in detail every decision pronounced by the Court he declared:

“The conclusion follows that as the grant of the power to regulate commerce among the States, so far as one system is required, is exclusive, the States cannot exercise that power without the assent of Congress, and, in the absence of legislation, it is left for the Courts to determine when State action does or does not amount to such exercise,

or, in other words, what is or is not a regulation of such commerce. When that is determined, controversy is at an end. . . . Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognizes as subjects of inter-State commerce are not such, or that whatever are thus recognized can be controlled by State laws amounting to regulations, while they retain that character; although, at the same time, if directly dangerous in themselves, the State may take appropriate measures to guard against injury before it obtains complete jurisdiction over them. To concede to a State the power to exclude, directly or indirectly, articles so situated, without Congressional permission, is to concede to a majority of the people of a State, represented in the State Legislature, the power to regulate commercial intercourse between the States, by determining what shall be its subjects, when that power was distinctly granted to be exercised by the people of the United States, represented in Congress, and its possession by the latter was considered essential to that more perfect union which the Constitution was adopted to create."

From this judgment and reasoning Justices Gray, Harlan and Brewer dissented, the former delivering an elaborate opinion in which he insisted that the New Hampshire case in Taney's time had established a wise and just rule, and was decided upon full argument and great consideration, and ought, therefore, to be followed; that the power of regulating or prohibiting the manufacture and sale of intoxicating liquors properly belonged, as a branch of the police power, to the legislatures of the several States, and could be judiciously and effectively exercised by them alone, according to their views of public policy and local needs; and could not practically, if it could Constitutionally, be wielded by Congress as part of a national and uniform system; that the statutes in question, enacted by the State of Iowa, to protect its inhabitants against the physical, moral and social evils attending the free use of intoxicating liquors, were not aimed at inter-State



commerce, had no relation to the movement of goods from one State to another, operated solely on intoxicating liquors within the territorial limits of the State, did not include all such liquors without discrimination, and did not even mention where they were made, or whence they came.<sup>1</sup>

At the same time, while sustaining the power of Congress to regulate inter-State commerce in relation to the liquor traffic, the Court has been careful to uphold in each and every case the authority of States to regulate or suppress the evils resulting from the manufacture and sale of liquor. Of these cases that of *Kidd v. Pearson*<sup>2</sup> stands as an example, in which it was held, in an opinion by Mr. Justice Lamar, that a law of Iowa authorizing the abatement as a nuisance of a distillery used for the unlawful manufacture and sale of intoxicating liquors, did not conflict either with the Constitution of the United States by undertaking to regulate commerce between the States, nor with the Fourteenth Amendment to the Constitution by depriving the owners of the distillery of their property without due process of law. It was shown that a State, in the exercise of its undisputed power of local administration, could enact a statute prohibiting within its limits the manufacture of intoxicating liquors, and that that right was not to be overthrown by the fact that the manufacturer in-

<sup>1</sup>It is a noteworthy circumstance how little of political bias prevails upon the bench; the strong National view was supported by the Chief Justice and Justices Field and Lamar, all of them Democrats, and the authority of the State was strenuously contended for by such Republicans as Justices Harlan, Gray and Brewer.

<sup>2</sup>128 U. S. 1 (1888). The above decision was confirmed in *Lyng v. Michigan*, 135 U. S., 161 (1890), but the effect of these decisions was almost immediately counteracted by an Act of Congress upholding the exercise of the police powers of the States under circumstances similar to those discussed in *Leisy v. Hardin*. In *Wilkinson, Sheriff of Shawnee County, Kansas, v. Rahner*, a case decided May 26th, 1891, the Constitutionality of this Act of Congress was upheld, and the leading case, which has been reviewed in the text, becomes of historical value only.

tended to export the liquors when made. The language of the Court in the License Tax Cases,<sup>1</sup> that over the internal commerce and domestic trade of the State Congress had no power of regulation nor indirect control, was quoted with approval, and it was shown that no interference by Congress with the business of citizens transacted within the State was warranted by the Constitution, and that the fact that the article was manufactured for export to another State, did not of itself make it an article of inter-State commerce.<sup>2</sup>

In *Nashville, Chattanooga & St. Louis Railway Co. v. State of Alabama*,<sup>3</sup> Mr. Justice Field sustained a State statute declaring that persons afflicted with color-blindness were disqualified for service upon railway lines within the State, and held that until Congress had legislated upon the qualifications, duties and liabilities of employes upon railway trains engaged in inter-State commerce, it was within the power of the State to provide against accidents on trains while within their limits.

The independence of the executive officers of the government in the discharge of their ordinary official duties, and their freedom from liability to coercion by mandamus, was established by Mr. Justice Bradley in the case of *United States v. Black*,<sup>4</sup> where it was held that the Court had no right to review the decision of the Commissioner of Pensions in refusing a pension certificate, his decision having been confirmed by the Secretary of the Interior.

In *Bank of Washington v. Hume*,<sup>5</sup> Chief Justice Fuller

<sup>1</sup> 5 Wallace, 470 (1866).

<sup>2</sup> See also *Eilenbecker v. District Court of Plymouth Co.*, 134 U. S., 32 (1890), and *Crowley v. Christensen*, 137 U. S., 86 (1890), in both of which the police powers of a State were sustained in the regulation, mitigation and suppression of the evils resulting from the manufacture and sale of intoxicating liquors. Another instance where the public powers of the State were sustained is to be found in the *Oleomargarine Case of Powell v. Pennsylvania*, 127 U. S., 678 (1888).

<sup>3</sup> 128 U. S. 96 (1888).

<sup>4</sup> 128 U. S. 40 (1888).

<sup>5</sup> 165 (1888).

sustained the insurable interest of a wife and children in the life of the husband by deciding that the creditors of one who had insured his life for the benefit of his wife and children, had no interest in the proceeds of the policies, nor could they recover the premiums paid upon policies issued upon his life for the benefit of his wife and children in the absence of evidence from which a fraudulent intent on the part of the latter or the insurance company could be inferred. It was asserted that public policy justified a debtor in preserving his family from suffering and want, and that the support of wife and children constituted a positive obligation in law as well as in morals, and that they should be protected from destitution after a debtor's death, by permitting him to devote a moderate portion of his earnings to sustain a security for such support.

In the interesting case of *Ex parte Terry*,<sup>1</sup> which grew out of a contempt of the authority of the United States Circuit Court for the Northern District of California, under the circumstances noticed in our sketch of Mr. Justice Field, the Court dealt with the power to issue a *habeas corpus* for the purpose of inquiring into the cause of the restraint of the liberty of prisoners in jail under authority of the United States. The power of a Court to punish for contempt was declared to be inherent; a breach of the peace in open Court was a direct disturbance and a palpable contempt, which it was competent for the Judge presiding, immediately upon its commission in his presence, to proceed upon his own knowledge of the facts to punish without further proof, without issue or trial in any form.<sup>2</sup>

In close connection with the foregoing case is that known as *In re Neagle*.<sup>3</sup> No case within the past ten years has at-

<sup>1</sup> 128 U. S. 289 (1888).    <sup>2</sup> Affirmed in *Savin*, Petitioner, 131 U. S. 267 (1889).

<sup>3</sup> 135 U. S. 1 (1890).

tracted more attention. Neagle, a Deputy Marshal, had been directed by the Attorney General of the United States to guard the person of Mr. Justice Field, whose life was thought to be in danger. While the Judge was in a railway eating-house, upon his journey from one city to another, where he expected to discharge his judicial duties, Terry committed a violent assault and battery upon him, and so acted that Neagle, believing that the attack would result in the death of the Judge unless he interfered, shot him in the act. Neagle was seized by the Sheriff of the county upon the charge of murder, but presented to the Circuit Judge a petition praying for his discharge. This being granted, the Sheriff promptly appealed to the Supreme Court. In a most elaborate opinion by Mr. Justice Miller, it was held that the prisoner was not only justified in defending the Judge as he had done, but that in so doing he acted in discharge of his duties as an officer of the United States. Therefore he could not be guilty of murder under the laws of California. A Justice of the Supreme Court, in attending Circuit and in traveling from place to place, was as much in the discharge of duty imposed upon him by law as he was while sitting in Court trying causes. When attacked by Terry, he was entitled to all the protection which the law could give him. It was determined, in answer to the contention that there was no statute of the United States authorizing any such protection as that which Neagle was instructed to give, that any obligation fairly and properly inferrible from the Constitution of the United States or any duty of the Marshal derived from the general scope of his duties under the laws of the United States, was "a law" within the meaning of the phrase as employed in Section 753 of the Revised Statutes. It was held that the President of the United States,

charged with the duty of taking care that the laws be faithfully executed, possessed the implied power of taking measures for the protection of a Judge of one of the Courts of the United States, and that the Department of Justice, acting through the Attorney General, was the proper Department to set in motion the necessary means of protection. It was further declared that there was a Peace of the United States which was violated by an assault upon a Federal Judge while in the discharge of his duties, and that, in such a case, a Marshal stood in the same relation to the peace of the United States as the Sheriff of the county did to the peace of the State of California. It was the duty of the United States to protect its officers from violence, even to death, in discharge of the duties which its laws imposed upon them. Congress had made the writ of *habeas corpus* one of the means by which that protection was made efficient. Hence the Court reached the conclusion that the prisoner should be discharged from the power of the State Court to try him for any offence, because, in doing the act with which he was charged, he did no more than was necessary and proper for him to do. He could not, therefore, be guilty of a crime under the law of the State. Nor was there any occasion for any trial in the State Court, nor in any Court; for the Circuit Court of the United States, in entertaining the petition for a *habeas corpus*, was as competent to ascertain the facts as any other tribunal.

From this judgment Mr. Justice Lamar delivered an elaborate dissenting opinion, concurred in by the Chief Justice, planting himself upon the proposition that there were no implied powers granted by the Constitution to the Executive, and that there was no "law," such as was meant by the phrase in the Revised Statutes, unless some express statute

could be pointed to. Such being the case, the killing of Terry was not by authority of the United States, no matter by whom done, and the only authority relied on for vindication must be that of the State, and the slayer should be remanded to the State Courts to be tried.

“The question then recurs,” said he, “would it have been a crime against the United States? There can be but one answer. Murder is not an offence against the United States, except when committed on the high seas, or in some port or harbor without the jurisdiction of the State, or in the District of Columbia, or in the Territories, or at other places where the National Government has exclusive jurisdiction. It is well settled that such crime must be defined by statute, and no such statute has yet been pointed out. The United States government being thus powerless to try and punish a man charged with murder, we are not prepared to affirm that it is omnipotent to discharge from trial, and give immunity from any liability for trial where he is accused of murder, unless an express statute of Congress is produced, permitting such discharge.”

A most important opinion delivered at this time, was that of Mr. Justice Miller in the case of the *United States v. The American Bell Telephone Company*,<sup>1</sup> a case argued by the most eminent special counsel, with a degree of learning and an exhaustive examination of authorities almost without parallel in the discussion of patent causes. After disposing of certain preliminary questions of pleading, it was held that the Circuit Court of the United States had jurisdiction in suits brought by the United States to set aside and cancel patents for inventions for frauds committed by the parties to whom they were issued, and that Congress did not intend by giving to private individuals the right to set up by way of defence to an action for infringement of a patent, that the patentee had surreptitiously obtained the patent or that he was not the first

<sup>1</sup> 128 U. S. 315 (1888).

inventor, to supersede the affirmative relief to which the United States is entitled in order to obtain the cancellation of a patent obtained by fraud. And the action of the lower Court in dismissing a bill filed in behalf of the United States was reversed, and the case remanded with directions to overrule the demurrer, with leave to the defendants to plead or answer within a time to be fixed by the Court.

An interesting question as to the right of a State to require physicians to procure certificates from a State Board of Health before attempting the practice of medicine, was considered by Mr. Justice Field in the case of *Dent v. State of West Virginia*,<sup>1</sup> and the Constitutionality of such a law was sustained, its object being to secure such skill and learning in the profession of medicine that the community might trust with confidence those receiving a license under the authority of the State.

In *Reynes v. Dumont*<sup>2</sup> the nature of a banker's lien was elaborately discussed by Mr. Justice Field. In *Gibbs v. The Consolidated Gas Company of Baltimore*<sup>3</sup> it was held that a corporation could not disable itself by contract from performing the public duties which it had undertaken, and that no person could recover for services for procuring a contract which was forbidden by statute or by public policy, where he was privy to the unlawful design of the parties. An interesting question of trademark was discussed by the Chief Justice in the case of *Menendez v. Holt*.<sup>4</sup>

In the matter of *Gon-Shay-Ee*<sup>5</sup> it was held, in an opinion by Mr. Justice Miller, that under the Act of March 3d, 1885, where a murder had been committed by an Indian within a Territory of the United States, that the offender was subject

<sup>1</sup> 129 U. S. 114 (1889).

<sup>2</sup> 130 U. S., 354 (1889).

<sup>3</sup> 130 U. S., 397 (1888).

<sup>4</sup> 128 U. S., 514 (1888).

<sup>5</sup> 130 U. S., 343 (1889).

not to the criminal laws of the United States, but to the laws of the Territory. After a full discussion of the incidents of trial, and a review of the whole history of the relations between the United States and the Indian tribes,<sup>1</sup> it was shown that they were important, relating as they did to the question of jurisdiction, and concerning the life and liberty of the party against whom a crime is charged, and it was said to be of consequence that in the new departure which Congress had made of subjecting the Indians in a limited class of cases to the same laws which governed the whites within the Territories where they both resided, that the Indian should have at least all the benefits which might accrue from that change which transferred him as to the punishment for crime from the jurisdiction of his own tribe to the jurisdiction of the government of the Territory within which he lived.

In the case of the *Pennsylvania Railroad Company v. Miller*<sup>2</sup> in a most elaborate opinion by Mr. Justice Blatchford, it was held that neither the charter of the Pennsylvania Railroad Company nor acts supplementary thereto, constituted such a contract between the State and Company as exempted the latter from the operation of an article in the Constitution of Pennsylvania, which required that corporations invested with the privilege of taking private property for public use, should make compensation for property injured or destroyed by the construction or enlargement of their works, highways or improvements. Nor did such Constitutional provision as applied to the Company impair the obligation of any contract between it and the State in respect to cases arising afterwards. The basis of the decision was that the Company had accepted its original power subject to the general law of the State, and to

<sup>1</sup> See case of *Crow Dog*, 109 U. S., 556 (1883); *U. S. v. Kagama*, 118 U. S., 375 (1886).

<sup>2</sup> 132 U. S., 75 (1889).



such changes as might be made in such general law, and subject to future Constitutional provisions and future general legislation. Since there was no prior contract with it, exempting it from liability to such future general legislation in respect to the subject matter involved, no such exemption could be admitted to exist unless expressly given, or unless it followed by implication equally clear with express words.

A death-dealing blow was struck at Polygamy in the great case of *The Mormon Church v. The United States*,<sup>1</sup> sustaining an Act of Congress by which the charter of the Church of Jesus Christ of Latter Day Saints was repealed and abrogated, the seizure of its property directed, and its property bestowed upon the United States as *parens patriæ* to be devoted to other religious and charitable uses under the *cy prés* doctrine.

Other subjects were considered: as the suability of States,<sup>2</sup> *Ex post facto* laws,<sup>3</sup> grants of power to municipal corporations to subscribe for stocks in railways,<sup>4</sup> the validity of laws inflicting the penalty of death by electricity,<sup>5</sup> which was held not to be a "cruel and unusual punishment;" while the effect of the Granger Cases was modified and softened,<sup>6</sup> and a distinction drawn and pointed between cases where State Courts

<sup>1</sup> 136 U. S., 2 (1889). See also *Davis v. Beason*, 133 U. S., 333 (1889), and *Cope v. Cope*, 137 U. S., 682 (1891); in the latter case the right of polygamous children to inherit was sustained, on the ground of protection to innocent and unfortunate beings.

<sup>2</sup> *Hans v. Louisiana*, 134 U. S., 1 (1889); *North Carolina v. Temple*, *Ibid.*, 22, (1890) and *Louisiana v. Steele*, *Ibid.*, 230 (1890).

<sup>3</sup> *Medley*, Petitioner, 134 U. S., 160 (1890).

<sup>4</sup> *Hill v. Memphis*, 134 U. S., 198 (1890).

<sup>5</sup> *In re Kemmler*, 136 U. S., 436 (1890).

<sup>6</sup> *Chicago, etc., Railway Co., v. Minnesota*, 134 U. S., 408 (1890). *Minneapolis Railway Co., v. Minnesota*, *Ibid.*, 467 (1890.)

had or had not jurisdiction of offences growing out of elections for Presidential Electors and for members of Congress.<sup>1</sup>

Since the days of Chief Justice Taney the sessions of the Supreme Court have been held in a crescent-shaped room near the Rotunda of the Capitol, formerly occupied by the Senate of the United States. The associations and traditions of this small, though imposing chamber throng upon the mind and detain the reverent stranger. Here Webster and Clay contended against Calhoun, Hayne, Benton and Wright. Here Charles Sumner appeared at the bar, on the 1st of February, 1865,—less than ten years after the decision in *Dred Scott v. Sandford* had been pronounced,—and moved for the admission of John S. Rock, of Massachusetts, a colored man. Here the sessions of the Electoral Commission were held, and here was the scene of many memorable arguments. Although the system of railroads and the consequent ease of communication with all parts of the country, as has been observed by Mr. Justice Bradley, now enable local counsel to argue their own cases, and have had the effect of lessening the elevated and eclectic character of the arguments made before the Court, yet here have appeared those redoubted leaders, Curtis and Campbell, Charles O'Connor, David Dudley Field, William M. Evarts, William Allen Butler and Clarkson N. Potter, of New York, Richard H. Dana, Jr., of Massachusetts, Reverdy Johnson and S. Teakle Wallis, of Maryland (the latter a pupil of Wirt), Jeremiah S. Black, Brewster and Ashton, of Pennsylvania, Henry Stanbery and James A. Garfield, of Ohio, George F. Edmunds and Edward J. Phelps, of Vermont, Henderson, of Missouri, McDonald, of Indiana, Merrick and Phillips, of the District of Columbia,

<sup>1</sup> *In re Loney*, 134 U. S., 372 (1890). *In re Green*, *Ibid.*, 377 (1890).

and a host of brilliant, able and learned advocates,—*duplex gemmis auroque corona*,—whose fame is a part of the glory of the Court, and the result of whose labors has been woven into the warp and woof of our Constitutional jurisprudence.

As the eye of the visitor sweeps from the marble busts of the dead Chief Justices to the living figures upon the bench and to the animated dialectician at the bar, the genius of the place seems to speak in the stately words of Clarendon: "The law is the standard and guardian of our liberty; it circumscribes and defends it; but to imagine liberty without law is to imagine every man with a sword in his hand to destroy him who is weaker than himself."

With the cases reviewed in the present chapter, we conclude this history of the Court. Although many decisions, important in their relation to the jurisprudence of the nation and to the science of law have been necessarily passed over in silence, yet a sufficient number of the Leading Cases of each epoch have been selected to enable the reader to judge of the spirit and character of the results accomplished. The steady expansion of principles, and the vigorous as well as irrepressible growth of the doctrine of Nationality are conspicuous phenomena. Constitutional provisions have been vitalized; Acts of Congress have been made to breathe; situations, conditions and circumstances, unprovided for by either, have been nurtured into living forces, presenting, when drawn up in array, a noble and imposing body of jurisprudential facts which, when studied and understood, will prove the best title to renown of the distinguished jurists to whose care and protection they were committed, the ceaseless source of the gratitude and veneration of posterity, and the best and most enduring bulwark of National greatness. As the safety of Troy depended upon the preservation of the heaven-descended

statue of Pallas, holding a spear in her right hand, and in her left a distaff and spindle, so the Supreme Court of the United States, enthroned in majesty and invested with power, wielding the imperial sceptre of National Sovereignty, while jealously guarding the rights of the States, will prove, as long as our institutions endure, the Palladium of the Republic.

NOTE.—As these pages are passing through the press we clip the following from the *Philadelphia Ledger* of May 27, 1891:

WASHINGTON, May 26.—The United States Supreme Court during the term ended yesterday exceeded the previous highest record of cases disposed of at one term of the Court, settling 617 cases against 470, which had heretofore been the largest number passed upon at a single term. The number of cases presented was unusually large, but of them only 15, which have been argued, go over until the next term for a decision, and it is probable that the opinions in these cases will be written during the summer recess for announcement soon after the Court reconvenes.

Among the important suits finally decided during the term are those of Pennsylvania and other States against the Pullman Palace Car Company, by which the company's cars are made liable to taxation; the State of Massachusetts against the Western Union Telegraph Company, in which the company's lines and other property are held to be subject to taxation; the Dick Duncan case, in which an unsuccessful attempt was made to overthrow the whole Penal Code of the State of Texas; a large number of Chinese exclusion cases; the Northern Pacific Railroad land case, involving title to \$5,000,000 worth of Northwestern lands; the Juiro, Wood and other New York electrocution cases; the Kansas liquor case, decided yesterday, in which the Constitutionality of the Original Package law was upheld; the applications of the Navassa rioters for *habeas corpus* writs; a supposedly final decree in the famous Myra Clark Gaines litigation; two important army decisions construing the terms under which private soldiers enlist; the Buffalo First National Bank suit, involving the liabilities of bank directors for losses sustained by the banks, and

various important license, customs, tax, patent and *habeas corpus* cases, and suits involving responsibility for personal injuries.

The only cases of general importance which go over are those of the State of Maine *v.* the Grand Trunk Railway Company and the Singer Machine Company *v.* Wright, State Comptroller, involving questions of taxation, and the United States against the Missouri, Kansas and Texas Railroad Company, in which titles to large tracts of land are in dispute.

The Court has set down a number of very important matters for argument before a full Bench immediately after the Court re-assembles in October, and the first two or three weeks will probably be devoted to hearing causes of National importance. Among those so assigned are the Behring Sea suit, the Counselman case, as to the right of the Inter-State Commerce Commission to compel witnesses to testify, the Baltimore and Ohio theatrical rate controversy, and the test suit with regard to the Constitutionality and validity of the McKinley Tariff and Customs Administrative Acts.

It is probable that under the recent Act of Congress, establishing an intermediate Court of Appeals, the number of cases that will finally reach the Supreme Court will be very considerably reduced.

## CHAPTER XXI.

REPORTERS OF THE DECISIONS OF THE SUPREME COURT  
OF THE UNITED STATES.

## ALEXANDER JAMES DALLAS.

THE first Reporter of the Decisions of the Supreme Court of the United States, although not officially appointed, was Alexander James Dallas, who was born on the Island of Jamaica on the 21st of June, 1759, and died in Trenton, New Jersey, upon the 14th of January, 1817. He was the son of a Scotch physician, who had emigrated to Jamaica, and resided there several years. Young Dallas was educated in Edinburgh and at Westminster. While a student, he made the acquaintance of Dr. Johnson, the celebrated lexicographer, and of Dr. Franklin, who was then pleading before the Privy Council the rights of the Assembly of Pennsylvania against the Proprietaries. He studied law in the Inner Temple, and returned to Jamaica in the year 1780, and upon his mother's second marriage removed in April, 1783, to Philadelphia, where he took the oath of allegiance to the Commonwealth of Pennsylvania. A few years later he was admitted to practice, and became eminently successful as a lawyer, ranking among the leaders of the bar. His name appears in all the prominent cases, and in January, 1791, he was appointed Secretary of the Commonwealth of Pennsylvania, and in December, 1793, his commission was renewed.

During this time he was editor of the *Columbian Magazine*. He prepared an edition of the "Laws of Pennsylvania with notes," and also compiled his four volumes of "Reports of Cases ruled and adjudged by Courts of the United States and Pennsylvania before and since the Revolution," which were published in Philadelphia, and which constitute the earliest series of American Reports. He served as Paymaster-General to the armed forces at Pittsburgh in 1794, and became again Secretary of State of Pennsylvania in 1796. He was appointed by President Jefferson United States District Attorney for the Eastern District of Pennsylvania, serving from 1801 until 1814, and conducting many famous prosecutions, notably that against General Michael Bright and others, for forcibly obstructing Federal process. In 1814 he was appointed by President Madison Secretary of the Treasury. During his administration of this Department he displayed great ability and did much to sustain the public credit, while his energetic measures advanced the value of Treasury notes. To him is due the credit of re-establishing the United States Bank in 1816. The Bill as first passed had been vetoed by Madison in the preceding year, but a similar measure was subsequently approved and the Bank established owing to the influence of Mr. Dallas and his explanation of the necessity and efficiency of such a means to sustain and improve the credit of the Government. Mr. Dallas also discharged the duties of Secretary of War, and having fully succeeded in rescuing the Government from a financial crisis, retired from office and returned to Philadelphia, but died a few weeks later. He also published Treasury Reports, "Features of Jay's Treaty," Philadelphia, 1795; "Speeches on the Trial of Blount," "Address to the Society of Constitutional Republicans," 1805, and "Exposition of the Causes and Character of the War of

1812." He left unfinished a "History of Pennsylvania." His son, George Mifflin Dallas, became Vice-President of the United States in 1845, and died in 1864. He had prepared for the press the "Life and Writings of A. J. Dallas," which was published in 1871.

#### WILLIAM CRANCH.

The first regularly appointed Reporter of the Decisions of the Supreme Court of the United States and the successor of Mr. Dallas was William Cranch, who was born at Weymouth, Mass., July 17th, 1769, and died at Washington on the 1st of September, 1855. His father, Richard Cranch, was a native of England, and for many years was a member of the Massachusetts Legislature, a Judge of the Court of Common Pleas, and the author of "Views of the Controversies concerning Anti-Christ." His son graduated at Harvard in 1789, studied law, and was admitted to the Bar in July, 1790. After three years' practice in the Courts of Massachusetts and New Hampshire, he removed to Washington, and in 1801 was appointed by President Adams Assistant Judge of the Circuit Court of the District of Columbia. In 1805 President Jefferson made him Chief Justice of this Court, which position he held until 1855. During this period only two of his decisions were overruled by the Supreme Court of the United States. Among the last services imposed upon him by Congress was the final hearing of patent causes after an appeal from the Commissioner of Patents. He published nine volumes of the Decisions of the Supreme Court of the United States, and six volumes of Reports of Decisions of the Circuit Court of the District of Columbia from 1801 to 1814. He also prepared a Code of Laws for the District, and published



in 1827 a "Memoir of John Adams," and in 1831 an address upon "Temperance."

#### HENRY WHEATON.

The third Reporter of the Decisions of the Supreme Court was Henry Wheaton, who was born in Providence, Rhode Island, upon the 27th of November, 1785, and died at Dorchester, Mass., on the 11th of March, 1848. His father, Robert Wheaton, was a Baptist clergyman, who emigrated from Wales to Salem, Mass., but subsequently settled in Rhode Island. Henry graduated from Brown University in 1802, and studied law with Nathaniel Searle, was admitted to the Bar in 1805, and in the same year continued his studies in Poitiers and London. Returning home, he practiced in Providence until 1812, when he removed to New York, where he edited for three years the *National Advocate*, the organ of the Administration party. He published in this paper notable articles on questions of neutral rights in connection with the existing war with England. In 1814 he became a Judge Advocate in the army, and in 1815 a Justice of the Municipal Court of New York City, serving until 1819. From 1816 to 1827 he was the Reporter of the Supreme Court of the United States, and published twelve volumes, which were printed in New York. He was an intimate friend of Mr. Justice Story, from whom he received much encouragement and assistance in his studies of international law and in the work of reporting the decisions of the Supreme Court. In fact, many of the learned and elaborate notes upon questions of international law and upon the practice of Admiralty and Prize Courts, which are published in the appendices to his volumes, were written by that eminent

jurist. Many of the most famous decisions of Marshall appear in his pages, and his work was termed by a German reviewer, "The Golden Book of American Law." William Beach Lawrence says: "The reputation which Mr. Wheaton acquired as a reporter was unrivaled. He did not confine himself to a mere summary of the able arguments by which the cases were illustrated; but there is scarcely a proposition on any of the diversified subjects to which the jurisdiction of the Court extends that might give rise to serious doubts in the profession that is not explained, not merely by a citation of authorities adduced by counsel, but by copious views which the publicists and civilians have taken of the questions." He was a member of the New York Constitutional Convention in 1821, and of the New York Assembly in 1823 and 1825, and was associated with John Duer and B. F. Butler on the Commission to revise the Statute Laws of New York. In 1827 he became Chargé d'Affaires in Denmark, and was the first diplomatist from the United States who acquired a reputation in Continental languages and literature. He became a member of the Icelandic Society. In 1835 he was appointed Resident Minister at the Court of Prussia, and in 1837 was made Minister Plenipotentiary. He received full power to conclude a treaty with the Zollverein, pursuing this object for six years. Upon the 25th of March, 1844, he signed a treaty with Germany, for which he received high commendation from President Tyler and from John C. Calhoun; the treaty was rejected by the Senate, but served as a basis for subsequent agreement. In 1846 he was recalled by President Polk, but the act provoked public condemnation. Mr. Wheaton, however, complied, and on his return to the United States was honored by public dinners in New York and Philadelphia, and was at once chosen lecturer on International

Law at Harvard University. This place he was too ill to accept. He was a corresponding member of the French Institute, and a member of the Royal Academy of Berlin. Brown University conferred the degree of LL.D. upon him in 1819, and Harvard in 1825. He delivered many public addresses, those before the New York Historical Society on the Science of Public or International Law being published in 1820. His most important work is entitled "Elements of International Law," published in Philadelphia in 1831 in two volumes, and in London in the same year. The work was translated into French, and published at Leipsic and Paris in 1848. It was at once acknowledged as a standard authority, and has also been translated into Chinese, and was published at the expense of the Imperial Government in four volumes at Peking in 1865. It was also translated into Japanese, and the eighth edition appeared in Boston in 1866. This edition unfortunately gave rise to an unpleasant controversy between its annotator, Hon. Richard H. Dana, Jr., and Hon. W. B. Lawrence, who had edited the sixth edition. Mr. Wheaton published also "Considerations on Establishing a Uniform System of Bankrupt Laws throughout the United States," "A Digest of the Decisions of the Supreme Court of the United States from its Establishment in 1789 to 1820," a "Life of William Pinkney," published in New York in 1826, and a "History of the Northmen," published in London in 1831 and translated into French in 1844. His "Histoire du Progrès du Droit des Gens en Europe," published in 1841, was translated into English in 1845 under the title, "A History of the Law of Nations in Europe and America." It is still the leading work on the subject of which it treats.

## RICHARD PETERS.

Mr. Wheaton was succeeded as Reporter by Richard Peters, who was the son of the Hon. Richard Peters, United States District Judge of the District of Pennsylvania, and a member of the old Continental Congress. He was born at Belmont, Philadelphia, on the 17th of August, 1780, and died on the 2nd of May, 1848. He studied law and was admitted to the Bar in 1800, and was Solicitor of Philadelphia County from 1822 to 1825, and one of the founders of the Philadelphia Savings Fund, the oldest institution of that kind in Pennsylvania. He published seventeen volumes of "Decisions of the Supreme Court of the United States," from 1828 to 1843; also "Reports of the Decisions of the United States Supreme Court" from 1803 to 1818, published at Philadelphia in 1819; also "Condensed Reports of Cases in the Supreme Court of the United States, from its organization until 1827," in six volumes, which were published in 1835, and a full and well-arranged "Digest of Cases determined in the Supreme, Circuit, and District Courts of the United States from the period of organization," contained in three volumes, bringing the decisions down to 1839, and a new edition in two volumes, bringing them down to 1848. He edited "Chitty on Bills of Exchange," in three volumes, and Washington's "Circuit Court Reports," in four volumes, the former being published in 1819, the latter between 1826 and 1829.

## BENJAMIN CHEW HOWARD.

Mr. Peters was succeeded by Benjamin Chew Howard, who was born in Baltimore County, Maryland, on the 5th of September, 1791, and died upon the 6th of March, 1872. He

was the son of Governor John Eager Howard, who had displayed his gallantry at the battles of Cowpens and Eutaw Springs. He was also the grandson of Benjamin Chew, who was Chief Justice of Pennsylvania before the Revolution. Mr. Howard graduated at Princeton in 1809, studied law, and practiced in Baltimore. In 1814 he assisted in organizing troops for the defence of his native city, and commanded the "Mechanical Volunteers" at the battle of North Point, upon the 12th of September, 1814. From 1829 to 1833 he was a member of Congress, having been elected as a Democrat, and again from 1835 to 1839, when he served as Chairman of the Committee on Foreign Relations, and drew up its report on the Northeastern Boundary question. In 1843 he was appointed Reporter of the Supreme Court of the United States, and held that post until 1862, publishing twenty-four volumes of Reports. In February, 1861, he was a delegate to the Peace Congress, which vainly tried to avert civil war. Princeton College conferred upon him, in 1869, the degree of LL.D.

#### JEREMIAH S. BLACK.

His successor was Jeremiah Sullivan Black, who was born in the Glades, Somerset County, Pennsylvania, upon the 10th of January, 1810, and died at York, in that State, on the 19th of August, 1883. He was of Scotch-Irish descent, his grandfather being James Black, who came to this country from the North of Ireland and settled in Somerset County, Pennsylvania, where his son Henry, the father of Jeremiah, was born in 1778, and became a noted man. Jeremiah studied law in the office of Chauncey Forward, a lawyer of Somerset County, and was admitted to the Bar in 1831. After eleven years of successful practice, he was raised to the Bench. A Jeffersonian

Democrat, he was nominated in September, 1842, to be President Judge of the District where he lived, and held this post for nine years. In 1851 he was elected by popular vote a Judge of the Supreme Court of Pennsylvania, and having drawn the lot for the short term, became thereby Chief Justice. He was then re-elected, in 1854, as an Associate Justice for the full term of fifteen years but resigned to become Attorney-General of the United States in President Buchanan's Cabinet in 1857. In 1860 he was appointed Secretary of State, and was succeeded by Edwin M. Stanton as Attorney-General. He maintained the duty of the Federal Government to defend itself against insurrection. He retired in 1861, and was appointed Reporter of the Decisions of the Supreme Court of the United States, but after publishing two volumes, resigned his post, and resumed his practice of law in York. During the later years of his life he became one of the leaders of the Bar of the Supreme Court of the United States, and was engaged in the most important causes, retaining his vigor and professional ability to the end. His arguments firmly established his reputation as an advocate of surpassing power. He was one of the counsel who appeared before the Electoral Commission in 1877, was a frequent contributor to periodical literature, entered into a newspaper discussion with Jefferson Davis, and also engaged in theological controversy with Robert G. Ingersoll. He was a follower of Rev. Alexander Campbell, the founder of the religious body calling themselves "Disciples of Christ."

#### JOHN WILLIAM WALLACE.

The seventh Reporter was John William Wallace, a son of John Bradford Wallace, a noted lawyer of the Philadel-

phia bar. He was born in Philadelphia upon the 17th of February, 1815, and died there on the 12th of January, 1884. He was a graduate of the University of Pennsylvania in 1833, studied law in Philadelphia and subsequently in the Temple at London, and became a standing Master in Chancery in the Supreme Court of Pennsylvania in 1844. He was Reporter of the Third Circuit of the United States Circuit Court, publishing three volumes of decisions from 1842 to 1853, and in 1863 was appointed Reporter of the Supreme Court of the United States, publishing its decisions from that time, in twenty-three volumes until 1876. From 1860 to 1884 he was President of the Historical Society of Pennsylvania. He also published "The Reporters," chronologically arranged, with occasional remarks upon their respective merits (Philadelphia, 1843). He edited and revised many works, and was the author of many learned and scholarly addresses on historical subjects.

#### WILLIAM TODD OTTO.

The eighth Reporter was William Todd Otto, who was descended from a long line of physicians, one of whom emigrated from Germany in the year 1752, and served in the Hospital at Valley Forge during the War of the American Revolution, while his son was an officer in the army during the same struggle. Mr. Otto was born in Philadelphia on the 19th of January, 1817, graduated from the University of Pennsylvania in 1833, studied law under Joseph R. Ingersoll, an eminent practitioner and eloquent advocate, and moved to Indiana where he was admitted to the Bar. He followed his profession until 1844, when he held the office of Judge of the District Court of Indiana for six years, also serving as Professor of Law in the University of Indiana, from which in-

stitution he received the degree of LL.D. In 1871 he was appointed arbitrator in behalf of the United States in the Convention with Spain for the settlement of claims of citizens of this country. Upon Mr. Wallace's resignation Mr. Otto was appointed Reporter of the Supreme Court of the United States, and held the post from 1875 to 1882, publishing sixteen volumes.

JOHN C. BANCROFT DAVIS.

The present Reporter of the Supreme Court is John C. Bancroft Davis, the son of Hon. John Davis, of Union, Massachusetts, and a nephew of George Bancroft, the historian. The father was a United States Senator, and a noted advocate of the policy of Protection. The son was born at Worcester, Mass., on the 29th of December, 1822, graduated from Harvard in 1840, read law, and entered upon an active practice. In 1849 when his uncle, Mr. Bancroft, left the English Court, he succeeded John R. Brodhead as Secretary of the Legation, and acted as *Chargé d'Affaires* for several months in that and the two succeeding years. He resigned in 1852, and became the American correspondent of the *London Times* from 1854 to 1861, and during that time practiced law in New York City. In 1868 he was a member of the New York Legislature, and the following year was appointed Assistant Secretary of State. In 1871 he became the American Secretary of the High Joint Commission that concluded the Treaty of Washington. He prepared the American case for submission to the Geneva Tribunal of Arbitration on the Alabama claims, and served as the Agent of the United States in prosecuting those claims before that High Court. In January, 1873, he returned to the United States and re-



sumed his place as Assistant Secretary of State. While holding this office he acted as arbitrator in disputes between Great Britain and Portugal. In July, 1874, he was appointed United States Minister to the German Empire. Upon his return from the Berlin mission, he was made Judge of the United States Court of Claims, in the District of Columbia, and served from January, 1878, until December, 1881. He was then again appointed Assistant Secretary of State, but resigned after six months' service. In November, 1882, he was re-appointed Judge of the Court of Claims, and on the 5th of November, 1883, became the Reporter of the Decisions of the Supreme Court of the United States. He has published United States Reports, Volumes 108 to 138 inclusive. He is a painstaking and accurate historian, thoroughly imbued with the true historical spirit, and has classified and arranged the precious but almost forgotten matter of historical interest in the Clerk's Office of the Supreme Court. He has rescued and had printed in the appendices to his Reports much valuable historical matter relating to the judicial functions of the Government prior to the adoption of the Constitution. He has also published omitted cases in the Appendix to Volume 131, U. S. Reports. He has annotated an edition of the Treaties of the United States, and published in French a treatise on the practice of American Courts.

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#### CLERKS OF THE SUPREME COURT.

The first Clerk of the Supreme Court of the United States was JOHN TUCKER, the selection of Chief Justice Jay, who spoke in terms of high praise of his courtesy and affability. He was a native of Newbury (Old Town), Massachu-

setts, where he was born on the 11th of August, 1753. The son of an eminent divine, he was carefully educated at Dummer Academy, at that time one of the best schools in New England. In 1770 he entered Harvard University, and graduated in 1774. After spending some years in the study of the law, he was appointed in 1783 junior clerk of the Supreme Judicial Court of Massachusetts. While holding this position, he was summoned on the 3rd of February to New York, then the seat of the National Government, to open the books of record of the Supreme Court of the United States. A fac simile of his hand-writing upon the first pages of the minutes, which are interesting as recording the events connected with the actual organization of the Court, is to be found in the Appendix to the 134th Volume U. S. Reports, p. 712. His hand-writing was round and clerkly; but he consistently misspelled the name of Mr. Justice Wilson,—a fact to which Mr. Davis, the present reporter of the Court, calls attention.

On the 1st of August, 1791, he resigned his place, and returned to Boston, resuming his duties as Clerk of the Supreme Judicial Court of Massachusetts, and continued in this place until his death on the 27th of February, 1825. He is said to have been a very popular man, well known throughout the State as "Clerk Tucker," or as "Judge Tucker." He was a man of commanding figure, and those who remembered him spoke of him as wearing a cheery countenance which was in itself "a perfect benediction."

The second Clerk of the Court was SAMUEL BAYARD, the fourth son of Col. John H. Bayard, of the distinguished Delaware family of that name. He was born in Philadelphia on the 11th of January, 1767, and died at Princeton, N. J., on

the 12th of May, 1840. After a preparatory course at grammar schools he entered Princeton College, and graduated in 1784 as the valedictorian. He subsequently studied law and practiced actively for seven years in Philadelphia. His appointment as the successor of Mr. Tucker was made upon the first of August, 1791, and he held the place until August 15, 1800. During the greater part of his term, however, he was absent and his duties were performed by Elias B. Caldwell. After the ratification of Jay's Treaty in 1794, Mr. Bayard was appointed by President Washington as agent of the United States to prosecute claims before the British Admiralty Courts, and this led to a residence in the City of London for four years. Upon his return to this country he went to New Rochelle, New York, and was appointed by Governor Jay Presiding Judge of West Chester County. In 1803 he resigned this office, removed to New York City, and resumed the practice of the law. Three years later he purchased an estate at Princeton, N. J., and was for several years a member of the State Legislature, and for some years acted as Presiding Judge of the Court of Common Pleas of Somerset County. He was one of the founders of the Princeton Theological Seminary, and was an unsuccessful candidate for Congress upon the Federalist ticket in 1814.

The third Clerk was ELIAS B. CALDWELL, named after Elias Boudinot, who among his many claims to distinction was the first to be admitted to the bar of the Supreme Court of the United States. Mr. Caldwell was born on the 3d of April, 1776. His mother was murdered by a British soldier when he was but two years old, and three years later his father, the Rev. James Caldwell, was murdered in cold blood by an Irish soldier. The orphan boy was then adopted

by the celebrated man for whom he was named. After a preliminary education he entered Princeton College and graduated in 1796. While Mr. Bayard was absent he acted as Clerk of the Supreme Court of the United States, and on August 5th, 1800, was duly appointed Clerk, serving until his death in 1825. He was one of the principal founders, in 1817, of the American Colonization Society, and was a zealous advocate of African colonization. His name was given to one of the towns of Liberia. He had been licensed as a preacher by the Presbytery, and was accustomed to occupy vacant pulpits on the Sabbath.

WILLIAM GRIFFITH, the fourth Clerk, was the son of a physician of Bound Brook, Somerset Co., N. J., and was born in the year 1766. He studied law in the office of Elisha Boudinot at Newark, was licensed as an attorney in 1778, and in due time became a counsellor, and in 1788 was called to be a Sergeant. He became a learned lawyer, and a very able advocate, acquiring a large practice, devoting himself to business with indefatigable industry, and mastering the land titles of his native State, and the doctrines of the common law relating to real estate. In 1796 he published a treatise on the jurisdiction and proceedings of justices of the peace, with an appendix containing advice to executors and administrators, and an outline of the law of landlord and tenant. Three years later he published a series of essays exposing the defects of the Constitution of his native State and urging a popular convention to revise it. He held the office of Surrogate and in 1801 was appointed one of the Judges of the United States Circuit Court for the Third Circuit, his associates being William Tilghman, afterwards Chief Justice of Pennsylvania, and Richard Bassett, the Chief Justice of Delaware, and is

thus known to fame as one of "the midnight judges." The causes decided by this court, which was in existence but a year, are to be found in a small volume entitled "Reports of Cases Adjudged in the Circuit Court of the U. S. for the Third Circuit," by John B. Wallace. Resuming business as an advocate, he met with but little success, and engaged in unfortunate land speculations, and the business of manufacturing woolen and cotton goods, of which he was ignorant. He then became a member of the Legislature, and exercised a powerful influence. He prepared three volumes of the "Annual Register of the United States" and wrote "Historical Notes of the American Colonies and Revolutions from 1754 to 1775." Upon the death of Mr. Caldwell, he was appointed Clerk of the Supreme Court of the United States, but died within a few months.

The fifth Clerk was WILLIAM THOMAS CARROLL, who was born at Bellevue, Maryland, on the 2d of March, 1802. After receiving an ordinary English education, he was sent to Emmitsburg, from which he graduated at the early age of twenty years. He studied law at Litchfield, Connecticut; was admitted to the Bar, and shortly afterwards was appointed lecturer at the Law Department of Columbia College, in the District of Columbia. His appointment as Clerk of the Supreme Court of the United States was dated January 28th, 1827, and he continued to discharge the duties of this office until his death, on the 13th of July, 1863. Chief Justice Taney said: "When we are appointing a successor to Mr. Carroll, it is but justice to his memory to say, that he was an accomplished and faithful officer, prompt and exact in business, and courteous in manner, and during the whole period of his judicial life discharged the duties of his office

with justice to the public and the suitors, and to the entire satisfaction of every member of the Court."

The sixth Clerk was the well-remembered DANIEL WESLEY MIDDLETON, who for more than fifty-three years was closely connected with the work of the Court. He was born on the first of May, 1805, and died on the 27th of April, 1880. At the time of Mr. Carroll's appointment, in 1827, Mr. Middleton, at the age of twenty-two, was acting as an assistant to the Clerk, and was immediately promoted to the position of deputy. His handwriting first appears on the records of the Court under date of the 7th of February, 1825. From that time until his death, he was, without interruption, as remarked by Chief Justice Waite, actively engaged in the business of the office, and even a whisper of complaint against him in any particular never reached the ears of the Court. He had seen Marshall, Taney, Chase and Waite upon the bench. Three Chief Justices and eighteen Associate Justices died after his service began. He had listened to Pinkney, Wirt and Webster at the bar; he had seen John Adams and Thomas Jefferson, and could state with clearness, fourteen years after the close of the Civil War, his recollections of them. Born within an arrow's flight of the Capitol, he had seen, in 1814, the Capitol in flames, and a new edifice arise, and for nearly sixty years had lived daily beneath the dome. Upon the death of Mr. Carroll, in 1863, he was appointed his successor by the unanimous vote of the Court. Discreet, urbane, courteous and painstaking, the benevolence and gentleness of his character endeared him to both bench and bar.

The present Clerk of the Supreme Court is JAMES HALL MCKENNEY, who was born on the 12th of July, 1837, near

Bel-Air, in the State of Maryland. He became a resident of Washington City in December, 1845, and in 1853 entered the office of the Clerk of the United States Circuit Court for the District of Columbia. Five years later he was appointed junior clerk of the Supreme Court of the United States by Mr. Carroll, and on the appointment of Mr. Middleton as Clerk, became the acting deputy, and after the authorization by law of the appointment of a Deputy Clerk, by the United States Circuit Courts, he was appointed to that position, which he occupied until the 10th of May, 1880, when he was selected by the Supreme Court of the United States as Mr. Middleton's successor. The unanimity of the Bench in voting for him was marked by the exertions of Mr. Justice Hunt, who, although confined to the house by serious illness, and not having been to the Court room for several months, left his chambers and went to the Capitol to declare his appreciation of Mr. McKenney by casting his vote for him.

Mr. McKenney was also elected and served as the Secretary of the Electoral Commission in 1877.

Closely associated for many years with the work of the Court, deeply interested in the history of the tribunal, and guarding its precious records with jealous care, vigilant, attentive and courteous, collecting with diligence the traditions of the Court, and making the only collection of the portraits of the Clerks known to exist, he has on all occasions upheld the hands of those interested in preserving and extending the history and influence of the tribunal, and has given universal satisfaction to the members of both bench and bar.





THE PROCEEDINGS IN CELEBRATION  
OF THE  
CENTENNIAL ANNIVERSARY

OF THE  
FOUNDATION AND ORGANIZATION OF THE SUPREME  
COURT OF THE UNITED STATES,

HELD IN THE CITY OF NEW YORK, FEBRUARY 4TH, 1890.



AN ACCOUNT  
OF THE  
CENTENNIAL ANNIVERSARY  
OF THE  
ORGANIZATION OF THE SUPREME COURT  
OF THE UNITED STATES.

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ON the 4th of February, 1790, at the Exchange in the City of New York, the Supreme Court of the United States was organized and held its first session.

It was eminently fitting that there should be a National Celebration of The Centennial Anniversary of an event so novel in the history of the world, so far reaching in its consequences, so beneficent in its results, and so fraught with blessings to this country. The President of the United States, in his Inaugural Address of the 4th of March, 1889, suggested the propriety of its observance, and The New York State Bar Association, at the instance of Elliott F. Shepard, Esq., adopted a suitable Resolution, by which a Committee of Arrangements was appointed "to take measures to celebrate on the first Tuesday of February, 1890, the one hundredth anniversary of the institution of the Judicial Department of the National Government, by the organization of the United States Supreme

Court on the first Tuesday of February, 1790, in the City of New York."

The Committee was authorized to add to their own numbers, and to invite the co-operation of such other associations and citizens as they thought proper. Of this Committee, Hon. William H. Arnoux, President of the Association, was appointed Chairman. Under the power conferred upon him, he selected seventy gentlemen as his associates, all of whom accepted the positions assigned to them except His Excellency David B. Hill, Governor of the State of New York, who, anticipating the necessity of legislative action requiring his official concurrence, declined from motives of delicacy.

Among those accepting were Ex-President Cleveland and Vice-President Levi P. Morton, who wrote, in terms expressive of their interest in the celebration, and of their willingness to promote its success.

One of the rooms of the Circuit Court of the United States in the Post Office Building was secured through the courtesy of the Secretary of the Treasury, and on the 30th of September, 1889, the Committee held its first meeting and the Chairman delivered the following address:

"GENTLEMEN :

On the First Tuesday of February, 1790, the Supreme Court of the United States, under the Chief-justiceship of John Jay, a citizen of this State, thus highly honored by Washington, held its first session in the City of New York, then the seat of the Federal Government. Prior to that time the executive and legislative branches of the Government had been successfully put in operation, but the judicial functions, the consummate flower of the wisdom of the framers of the Constitution, were tested last of all.

The institution of a Judicial body so comprehensive and far-reaching, so implicitly trusted and obeyed, so republican in form and final in effect was, to the absolutism of Europe, a bold innovation, a stupendous experiment. It was unparalleled in the world's history. Now it is no longer an experiment, with cavil or misgiving, but a monumental and rounded fact.

The Executive, with a million soldiers at his command, the Congress of the United States, with its power, forty States, sovereign in their sphere, and sixty-five millions of people occupying a continent, a proud and liberty-loving people, jealous of their rights, bow to the decree of a Tribunal of nine Civilians that has not a single sword to enforce its judgments, and has to depend upon the Executive for its personal protection. A century has rolled away in which it has never in a single instance been successfully defied. What a sublime spectacle of the reign of law; realizing the aphorism, 'Beneath the rule of men entirely great, the pen is mightier than the sword.'

From first to last its dignity has been maintained and preserved, and when we consider the conflicting interests and the prejudices of the vast and complicated nationalities, States, Territories and peoples, we are amazed at the result.

This august Tribunal, under the leadership of John Marshall, as a jurist the peer of Lord Mansfield, England's greatest judge, cemented and bound together the foundations of the Republic and made a nation possible. Without it the Union would have simply been a rope of sand.

When France, imitating our example, lifted aloft the torch of Liberty to enlighten the World, the centennial of which she so grandly celebrates this year, in her unrivalled Exposition, and still more grandly in her recent elections, which have renewed her allegiance to Republicanism, she did

not or could not adopt our Judicial system. If that had been possible, perhaps her liberties, like ours, would never have suffered an eclipse.

No centennial deserves a more hearty recognition from the people, nor appeals so strongly to our own profession. It was eminently proper that the New York State Bar Association should take the initiative and resolve to suitably celebrate this most important national anniversary, and that one of its former presidents should have performed the graceful task of reminding us of our duty and opportunity.

We meet, not to discuss or criticise the Court. The common consensus of the learned, the thoughtful, and the wise, of experienced statesmen and jurists in all nations, has already preceded us in appreciating the wonderful success of an institution exclusively American, the conclusive arbiter in all our contentions; and they have awarded us honorable and unreserved praise. But we meet, on broadest grounds of patriotism and gratitude, to acknowledge and celebrate its worth and its beneficent results, to recognize the great debt which we as a nation owe it, so that in the records of History there may be proof anew that Republics are not always indifferent or ungrateful.

To make this celebration worthy of its importance we should endeavor to secure the co-operation of the Nation and of all the States of the Union and the attendance of representatives from all other countries. We should invite the influential, the intellectual, the cultured and especially the Bench and the Bar throughout our broad country to join us in doing homage to this august Tribunal. Public officials, private citizens, and professional men should meet on this occasion animated by a common purpose.

This result can be attained by proper committees to be

appointed by the gentlemen here assembled. I deemed my authority, under the resolution adopted by an Executive Committee, to be limited to our membership and confined my designations accordingly, but no such limitation is placed upon the Committee. I recommend additions of gentlemen not on our rolls and that auxiliary committees be appointed in other States especially to secure as large an attendance of the Judiciary as possible.

And I am assured that the officers, particularly our Secretary, and the members of the Executive Committee, will at all times heartily co-operate with this Committee in furthering the celebration of the Judiciary Centennial."

Mr. William B. Hornblower was then chosen Secretary, a selection which was subsequently made permanent. A subcommittee on Plan and Scope with William Allen Butler, Esq., as Chairman, was appointed to draft an Order of Exercises which was reported to a subsequent meeting and adopted in all its details. It provided that Ex-President Cleveland should be the presiding officer upon the Memorial Occasion; that four addresses should be delivered by gentlemen of professional eminence, representing the New England, Middle, Southern and Western States, respectively. The topics of each address were to be: The Constitution and the Sovereignty of the People; The Origin of the Supreme Court of the United States and its Place in the Constitution; The Supreme Court and the Constitution; The Personal Characters of the Chief Justices. The Orators chosen were Hon. Edward J. Phelps, of Vermont; William Allen Butler, Esq., of New York; Hon. Henry Hitchcock, of Missouri, and Thomas J. Semmes, Esq., of Louisiana. The Musical parts of the programme were to be furnished by the Symphony Orchestra of the Metropolitan Opera

House, which had volunteered its services through Mr. Edmond C. Stanton; and the German Liederkrantz Society, with a chorus of one hundred voices under the Presidency of Mr. William Steinway. Judge Arnoux as Chairman of the General Committee visited Washington, and, by special invitation to a conference between the members of the Court, was enabled to lay before them the plans for the celebration, and to secure their heartiest concurrence.

At a later day an Organization was effected in harmony with the sentiments appropriate to the occasion. The number of the original committee was increased to one hundred, to symbolize the years of the century: an Executive Committee of thirteen was appointed, representing the number of original States, while the Finance Committee consisted of nine, corresponding with the present number of the members of the Court. The chairman of each committee was made an *ex officio* member of the Executive Committee; the Chairman and Secretary of the General Committee were made *ex officio* members of all Standing-committees, while the Treasurer was made an *ex officio* member of the Finance Committee. This arrangement, primarily intended to secure harmony, proved most effective and produced the happiest results.

The New York Bar Association and the American Bar Association most zealously co-operated. The style was adopted of "The Judiciary Centennial Committee," of which Hon. William H. Arnoux was appointed Chairman. Special committees upon The Entertainment of Guests and Transportation were appointed.<sup>1</sup>

The Metropolitan Opera House was secured for the 4th of February, 1890, and a prior claim to its use was most

<sup>1</sup> A full list of the membership of all Committees, General and Special, will be found in the Appendix to this Account.



courteously and gracefully waived. The portraits of the Chief Justices of the United States were obtained for the purposes of exhibition and decoration through the action of the Court and Congress, at the instance of Senator Evarts. Invitations were extended to all Federal judges, both Circuit and District; to all judges who were members of the highest Courts in the States, and to all members of the Courts of record in New York and Brooklyn; to the President and his Cabinet; the Vice-President; the Governor and Lieutenant-Governor of New York; the Speaker of the House of Representatives of the United States, the members of the Judiciary Committee of the Senate and House, and the Speaker of the New York Assembly, and other distinguished guests who embraced the opportunity of participating in an event replete with historical reminiscences, and of doing honor to the long record of purity and exalted ability of that great tribunal which had proved the safeguard of Constitutional government.

The plans thus carefully framed were successfully carried out, but on the day preceding that of the celebration the afflicting intelligence arrived of the sudden bereavement, through an awful casualty by fire, of the Hon. Benjamin F. Tracy, the Secretary of the Navy, and that the President and his Cabinet officers, under the shadow of this national sorrow, would not be able to attend.

Upon the morning of the Fourth of February, 1890, the vast auditorium of the Metropolitan Opera House was filled to its utmost capacity, with a brilliant and distinguished audience, assembled to pay a tribute of honor and respect to the present members of the Court, and to testify to their appreciation of the services of a Tribunal, which, for one hundred years, has been the great Conservative Department of the Government in expounding and upholding the Constitu-

tion of the United States and the supremacy of the Federal authorities. Never before in the history of the country had there been gathered together at one time and in one place so many famous jurists and men learned in the law. The boxes were occupied by the wives and daughters of the Justices and of the members of the Committee; the only vacant ones being those upon the right of the stage which had been assigned to the families of the President and his Cabinet—mute reminders of the tragedy which had deprived the occasion of their presence.

The building was superbly and appropriately decorated. Streamers of the National colors were suspended from the dome and trained back to the upper gallery. The galleries themselves were profusely draped with large silken flags, and in the spaces between the first and second tier of boxes the Coats-of-Arms of the States and Territories of the Union were displayed. The stage was surmounted by a vast arch draped with flags and to the centre a fac simile of the Seal of the Supreme Court of the United States was attached. Upon the right and left of the stage the portraits in oil of the Chief Justices of the Court stood upon Easels, adding to the interest and significance of the scene.

At the appointed hour the members of the Court and special guests, amid a burst of great and spontaneous applause, entered the Opera House in the following order:

THE CHIEF USHER AND FOUR USHERS;  
 THE CHAIRMAN OF THE EXECUTIVE COMMITTEE;  
 THE CHAIRMAN OF THE COMMITTEE OF ONE HUNDRED;  
 THE CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES;  
 THE ASSOCIATE JUSTICES AND EX-JUSTICE OF THE SUPREME COURT OF THE UNITED STATES;  
 THE CLERK AND MARSHAL OF THE SUPREME COURT OF THE UNITED STATES;  
 THE PRESIDENT OF THE NEW YORK STATE BAR ASSOCIATION;  
 THE PRESIDENT OF THE BAR ASSOCIATION OF THE CITY OF NEW YORK;  
 THE CHAIRMAN OF THE COMMITTEE OF THE AMERICAN BAR ASSOCIATION;

THE SENATORS AND EX-SENATORS OF THE UNITED STATES ;  
MEMBERS OF THE JUDICIARY COMMITTEE OF THE HOUSE OF REPRESENTATIVES OF THE U. S. ;  
THE PRESIDENT PRO TEM. OF THE SENATE OF THE STATE OF NEW YORK ;  
THE ORATORS OF THE DAY ;  
THE CHAIRMEN OF THE COMMITTEES ON COMMEMORATIVE EXERCISES AND ON  
ENTERTAINMENTS AND RECEPTIONS ;  
THE CHAIRMEN OF THE COMMITTEES ON INVITATIONS AND ON FINANCE ;  
THE SECRETARY AND THE TREASURER OF THE COMMITTEE OF ONE HUNDRED ;  
THE CHIEF JUDGE OF THE COURT OF APPEALS OF THE STATE OF NEW YORK, FIRST DIVISION,  
AND THE ASSOCIATE JUDGES AND EX-JUDGE ;  
THE CHIEF JUDGE OF THE COURT OF APPEALS OF THE STATE OF NEW YORK,  
SECOND DIVISION, AND THE ASSOCIATE JUDGES ;  
THE CLERK OF THE COURT OF APPEALS OF THE STATE OF NEW YORK ;  
THE UNITED STATES CIRCUIT JUDGES AND EX-CIRCUIT JUDGES ;  
THE UNITED STATES DISTRICT JUDGES AND EX-DISTRICT JUDGES ;  
THE JUDGES OF THE HIGHEST APPELLATE COURT OF EACH STATE, THE STATES  
RANKING ALPHABETICALLY ;  
THE PRESIDING JUSTICES OF THE SUPREME COURT OF THE STATE OF NEW YORK ;  
THE CHIEF JUDGES OF THE SUPERIOR COURT AND COURT OF COMMON PLEAS  
OF THE CITY OF NEW YORK ;  
THE JUSTICES OF THE SUPREME COURT OF THE STATE OF NEW YORK ;  
THE JUDGES OF THE SUPERIOR CITY COURTS OF THE STATE OF NEW YORK ;  
OTHER INVITED GUESTS ;  
MEMBERS OF THE COMMITTEE OF ONE HUNDRED ;  
MEMBERS OF THE RECEPTION COMMITTEE.

Mr. Grover Cleveland, as Chairman of the Executive Committee, took the chair.

Upon his right sat the members of the Court: Chief Justice Fuller and Associate Justices Miller, Field, Bradley Harlan, Gray, Blatchford, Lamar and Brewer. Next to them sat Mr. Justice Strong, retired. Upon his left were seated Hon. William H. Arnoux, Hon. Edward J. Phelps, William Allen Butler, Esq., Hon. Henry Hitchcock, Thomas J. Semmes, Esq. and Frederick R. Coudert, Esq. Immediately behind them were the Rev. Dr. Dix, the members of the New York

Court of Appeals, the Judges of the United States Circuit and District Courts; the members of the various State Courts; the members of the Committees of the Bar Association and specially invited guests.

The Exercises were formally opened by Mr. Coudert, who introduced Mr. Cleveland as the Chairman of the day's proceedings, who delivered the following address:

ADDRESS OF EX-PRESIDENT CLEVELAND.

I am sure that I need not remind this audience of the terrible disaster and distressing bereavement which prevents the President of the United States and other high officials at the seat of Government from joining us in these exercises. We cannot greet them here as we and they had planned; but we and all their fellow-countrymen will pause to extend to them heartfelt and sincere sympathy as at their homes they mourn or bury their dead.

We are accustomed to express on every fit occasion our reverence for the virtue and patriotism in which the foundations of our Republic were laid, and to rejoice in the blessings vouchsafed to us under free institutions. Thus we have lately celebrated with becoming enthusiasm, the centennials of the completion of our Constitution and the inauguration of our first President.

To-day we have assembled to commemorate an event connected with our beginning as a People, which more than any other gave safety and the promise of perpetuity to the American plan of government, and which, more than any other, happily illustrated the wisdom and enlightened foresight of those who designed our national structure.

In the work of creating our Nation, the elements of a free government were supplied by concessions of sovereign

States, by surrender of accustomed rights, and by the inspiration of pure and disinterested patriotism. If from these elements there had not been evolved that feature in our Federal system, which is our theme to-day, the structure might have been fair to look upon, and might have presented a semblance of solidity and strength; but it would have been only a semblance, and the completed edifice would have had within its foundations the infirmity of decay and ruin.

It must be admitted that it is hardly within the power of human language so to compass diverse interests and claims within the lines of a written Constitution as to free it entirely from disputes of construction; and certainly diverse constructions were apt to lurk in the diction of a Constitution declared by the President of the Convention which formulated it to be "the result of a spirit of amity and of that mutual deference and concession which the peculiarity of our political situation rendered indispensable."

It is fairly plain and palpable, both from reason and a review of events in our history, that without an arbiter to determine finally and conclusively the rights and duties embraced in the language of the Constitution, the Union of States and the life of the American Nation must have been precarious and disappointing. Indeed, there could hardly have been a well-grounded hope that they would long survive the interpretation of the National Compact by every party upon whom it rested, and the insistence of each to the last extremity upon such an interpretation as would secure coveted rights and benefits, and absolve from irksome duties and obligations.

In the creation of the world, the earth was without form and void, and darkness was upon the face of the deep, until God said, Let there be light, and there was light.

In the creation of the new Nation, our free institutions were without the form and symmetry of strength, and the darkness of hopelessness brooded over the aspirations of our people, until a light in the Temple of Justice and Law, gathered from the Divine Fountain of Light, illumined the work of the Fathers of the Republic.

On this centennial day we will devoutly thank Heaven for the revelation to those who formed our government of this source of strength and light, and for the inspiration of disinterested patriotism and consecrated devotion which established the tribunal which we to-day commemorate.

Our fathers had sacrificed much to be free. Above all things, they desired freedom to be absolutely secured to themselves and their posterity. And yet with all their enthusiasm for that sentiment, they were willing to refer to the tribunal which they devised all questions arising under their newly formed Constitution, affecting the freedom and the protection and safety of the citizen. Though bitter experience had taught them that the instrumentalities of government might trespass upon freedom, and though they had learned in a hard school the cost of the struggle to wrest liberty from the grasp of power, they refused, in the solemn work they had in hand, to take counsel of undue fear or distracting perturbation; and they calmly and deliberately established as a function of their government a check upon unauthorized freedom and a restraint upon dangerous liberty. Their attachment and allegiance to the sovereignty of their States were warm and unfaltering; but these did not prevent them from contributing a fraction of that sovereignty to the creation of a Court which should guard and protect their new nation, and save and perpetuate a government which should in all time to come bless an independent people.

I deem myself highly honored by the part assigned to me in these commemorative exercises. As in eloquent and fitting terms we shall be led, by those chosen to address us, to the contemplation of the history of that august tribunal organized one hundred years ago; as the lives and services of those who in the past have presided over its councils are rehearsed to us; as our love and veneration for our fellow-countrymen who now fill its high and sacred places are quickened, and as we are reminded of the manner in which our National Court has at all times illustrated the strength and beneficence of free institutions, let us be glad in the possession of this rich heritage of American citizenship, and gratefully appreciate the wisdom and patriotism of those who gave to us the Supreme Court of the United States.

The Reverend Morgan Dix, D.D., L.C.L., Rector of Trinity Church, New York, offered appropriate prayers from the Prayer-Book of the Protestant Episcopal Church.

An Address of Welcome to the Court was then delivered by the Hon. William H. Arnoux, Chairman of The Judiciary Centennial Committee.

ADDRESS OF HON. WILLIAM H. ARNOUX.

*Mr. Chairman, Ladies and Gentlemen :—*

The President of the United States in his inaugural address first invited attention to the celebration of the centenary of the organization of the Supreme Court of the United States.

"Our people," he says, "have already worthily observed the centennials of the Declaration of Independence, of the Battle of Yorktown, and the adoption of the Constitution, and will shortly celebrate in New York the institution of the

second great department of our constitutional scheme of Government. When the Centennial of the Institution of the Judicial Department by the organization of the Supreme Court shall have been suitably observed, as I trust it will be, our Nation will have fully entered its Second Century."

Moved by this spirit, and following the initiative of the President, the State Bar Association in co-operation with the American and City Bar Associations selected a Judiciary Centennial Committee, under whose auspices I have the honor to address the Court and this brilliant audience which has assembled to celebrate this important event.

*Mr. Chief Justice of the United States and gentlemen, the Associate Justices of the Supreme Court of the United States,* we welcome you in behalf of those who are here assembled, representing the Executive and Legislative Departments of the Government, National and State, the Bench and the Bar of the Federal and State Courts, whose selected delegates have gathered here from Maine to California, and the People of the United States, the freest and the happiest in the world.

It is most fitting that this welcome should be extended to you at this place and time, because one hundred years ago this day, on the first Tuesday of February, 1790, the Supreme Court of the United States held its first session at the Exchange in the City of New York, and installed into office the Chief Justice, two Associate Justices and the Attorney-General. The Court then adjourned for want of business!

This action completed the organization of the Three Departments of the Government. It was the bright consummate flower of a vigorous growth that had been nurtured and watched over with prayers and tears and blood by an immortal band of patriots. Fifteen years before, Washington, first



of all, had conceived the idea of such a Court, and on the day we celebrate it had become an accomplished fact.

Nominated by the President, confirmed by the Senate, independent of both, without which the Union would have been a rope of sand, your tribunal is removed from the passions, the prejudices, the temptations, the ambitions that assail and sway the other branches of Government, or that affect Courts in other lands that are dependent upon sovereign power.

Vested with extraordinary powers never before contemplated, never yet conferred upon any other judicial body, you are the ultimate repository of the rights and liberties of the people, the conservative restraining force that can curb unlawful executive action and abrogate unconstitutional legislative enactments, without arms, ammunition, or a treasury at your command; and to your glory be it said your power has not been abused by you or resisted by the States. In your judgments you have verified the declaration of Cicero that Justice is obedience to the written law which is superior to the magistrate as the magistrate is superior to the people. You have proved that nothing is law that is not reason, and where in rare instances you have found that the reason had failed, you have exhibited the highest nobility that mankind is capable of in acknowledging your error and in reversing your own decisions.

Your labors began with a Nation whose population scarcely exceeded that of this city and its vicinity at the present time, and now more than sixty-five millions of people, extending from Ocean to Ocean, and from the Tropics to the Arctic zone, of different races, religions, politics and interests, alike cheerfully and loyally submit to your decrees. A benign and watchful Providence we devoutly believe has guided and guarded your deliberations and enabled you to do justice and

promote equity. You are enshrined in the hearts of the people over whom you have shed the gladsome light of jurisprudence. Animated by the same spirit of affection and respect, future millions will bless the wisdom that established and directed the Court.

I adopt the reverent language, a benediction and a prayer, to which you listen at the opening of your sessions, and say,  
 GOD BLESS THE UNITED STATES AND THIS HONORABLE COURT.

William Allen Butler, Esq., was then introduced and delivered the following address upon "The Origin of the Supreme Court of the United States, and its Place in the Constitution:"

ADDRESS OF WILLIAM ALLEN BUTLER, ESQ.

"THE ORIGIN OF THE SUPREME COURT OF THE UNITED STATES AND ITS PLACE IN  
 THE CONSTITUTION."

THIS Commemorative hour sets before our view, in the retrospect, and after the lapse of a century, the structure of our National Government at the moment when, for the first time, it stood complete in all its parts.

The new order of things established by the Federal Constitution, adopted by the Convention, September 17, 1787, came very gradually into being. The ratification by eleven of the thirteen States was not completed until July, 1788. The first Congress summoned to meet in New York, as the seat of government, on the 4th of March, 1789, did not convene until the beginning of April, when, after counting the votes of the Electoral Colleges, it declared Washington the President-elect. His inauguration followed on April 30th, but, as yet, there was no Federal Judge to administer the

oath of office required by the Constitution of the Chief Magistrate of the Republic. This service was performed by Robert R. Livingston, the first Chancellor of New York, under the Constitution of that State of 1777.

Congress, on the day after its organization, entered on the work of providing for the establishment of the Judiciary by appointing a Committee, of which Oliver Ellsworth, one of the framers of the Constitution, and afterwards Chief Justice of the Supreme Court, was the Chairman. The Judiciary Act, which set in order and regulated the whole system of District and Circuit Courts of the United States, substantially as it exists to-day, was largely the work of this eminent jurist. It was approved by Washington, September 24th, 1789.

The first section of this act provided "that the Supreme Court of the United States shall consist of a Chief Justice and five Associate Justices, any four of whom shall be a quorum, and shall hold annually, at the seat of government, two sessions, the one commencing the first Monday of February, and the other the first Monday of August."

Washington promptly nominated, and the Senate as promptly confirmed, John Jay, of New York, to be Chief Justice of the Court, and as Associate Justices, John Rutledge, of South Carolina, William Cushing, of Massachusetts, Robert H. Harrison, of Maryland, James Wilson, of Pennsylvania, and John Blair, of Virginia. Of these, Jay, Cushing and Harrison had respectively served as Chief Justices in their own States; Rutledge, Wilson and Blair had been members of the Convention which framed the Constitution.

Harrison declining to serve, his place was afterwards filled by the appointment of James Iredell, of North Carolina.

On the first Monday of February, 1790, the day fixed

for the opening session of the Court, a quorum was not present; on the following day, the first Tuesday of February—one hundred years ago—the room in the Exchange, set apart for the Court, the Federal Hall being occupied by Congress, was, as we are informed by the *United States Gazette*, in its issue of the next day, “uncommonly crowded.” Numerous Federal, State and municipal officers were present, “and a great number of the members of the Bar.” The Chief Justice and Associate Justices Cushing, Wilson and Blair took their seats on the Bench, attended by the Attorney-General of the United States, Edmund Randolph, of Virginia; the Letters Patent commissioning all these officers were read by John McKesson, Esq., who acted as temporary Clerk; Richard Wenman was appointed “Cryer;” proclamation was made, and the Supreme Court of the United States was opened.

By these acts, marked with true Republican simplicity, the full breath of life was breathed into the government of the United States, and it became a living organism.

John Jay wore on this occasion the ample robe of black silk, with salmon-colored facings on the front and sleeves, which the pencil of Gilbert Stuart has perpetuated in the fine portrait, a copy of which is now in the Chambers of the Supreme Court at Washington. It was, as the family tradition declares, the academic gown of a Doctor of Laws, according to the usage of the University of Dublin, which had conferred this degree not long before upon the new Chief Justice, who in the absence of precedent or rule, thus gracefully associated the garb of the University with the dignity and destiny of the new tribunal in which he presided, a not unfitting attestation that the true equipment and investiture for judicial office is not political affiliation, but professional fitness.

The associate Justices wore the ordinary black robe which has since come into vogue as the vestment of all the members of the Court.

After the appointment as Clerk of John Tucker, late Clerk of the Supreme Court of Massachusetts, whom Fisher Ames had recommended for the place, and the adoption of a seal, the roll of Attorneys and Counsellors was opened on the 5th of February, and a few names were inscribed on the parchment. The rule of admission preserved the old distinction of Attorneys and Counsellors; the former were not permitted to practice as Counsellors, nor the latter as Attorneys, a discrimination afterwards abrogated. The first name on the roll of Counsellors was that of Elias Boudinot, of New Jersey, a Revolutionary patriot and philanthropist, conspicuous in the Continental Congress and later, in the first Congress of the United States; held also in revered memory as the first President of the American Bible Society.

In strange contrast with the proceedings of the present time, the Court, after a few formal sessions, adjourned February 10th, for want of business. It was a Court without suitors, its virgin docket unsullied by any entry of petitioners, plaintiffs in error, or appellants, and its earliest session was unclouded by any portent of that vast avalanche of litigation which during the succeeding years of its first century has overwhelmed it with a silent, but irresistible growth.

Congress, which in 1789, gave its best thought and talent in aid of the establishment of the Supreme Court, can, to-day, provide relief against the over-taxing of its powers. Is it too much to ask that in this Centennial year, something of the interest which Ellsworth and his compeers showed, may now be accorded to provide the relief which the Court needs, which

the American Bar solicits, and which the rights of suitors demand?

One interesting incident of the first session of the Supreme Court in this city may detain us for a moment longer. It established a precedent which is happily recognized and followed to-day. The Court accepted an invitation to dinner. The host who entertained it was the Grand Jury. This body, representing the most ancient jurisdiction of the Common Law of England, and one of its chief conservators of private rights and liberties, was the first to extend a welcome to this newest Court of highest and last resort, and in the interchange of patriotic greetings and sentiments to forecast its brilliant future.

The jurisdiction thus auspiciously established has ever since been exercised by the six Chief Justices and the forty-four Associate Justices, who have been the successors in office of Jay and his original associates, and it has been deemed appropriate on this commemorative occasion to delineate, in a brief sketch, the origin of the Court, the nature of its powers under the Constitution, and its place in our free system of government.

That the powers which the thirteen States delegated to the new government of the United States must be distributed among three departments,—the Legislative, the Executive and the Judicial,—was required by an axiom of the science of representative government. Already, in the Constitutions of many of the States, this division had been imperfectly attempted; but by the Articles of Confederation, which had served under the strain and pressure of the War of Independence to hold the States together till the end of the long struggle, all the powers of government were mainly vested in

a single Assembly. There was no Judicial Department, and the whole system was wanting in the elements required for permanent Union.

Long before the meeting of the Convention to frame the Constitution, the establishment of an independent Judiciary, as a separate and distinct department of the Government, had become a cardinal idea. Jay wrote to Washington on August 18, 1776, just after the Declaration of Independence:

"I have long thought, and become daily more convinced, that the Constitution of our Federal Government is fundamentally wrong. To vest Legislative, Judicial and Executive power in one and the same body, daily changing its members, can never be wise. In my opinion, these three great departments of sovereignty should be forever separated, and so distributed as to serve as checks on each other."<sup>1</sup>

In the various plans submitted to Washington by his co-workers in the effort for a Convention and a Constitution, the same view appears. One of the earliest of these was promulgated by General Knox, the companion in arms and life-long friend of Washington, and during his entire administration Secretary of War. In a letter to his chief, of January 14, 1789, this brave soldier, as ready with his pen as with his sword, sketched the outlines of a Constitution containing express provisions for a Judiciary, with life tenure of office and supreme powers, substantially as the Constitution afterwards ordained.

The fact is conspicuous, that as the leaders of American Independence fastened upon the idea of substituting for the loose compact of the Confederation a Union of the States based on the absolute sovereignty of the People and the surrender by the separate States of all the powers needed to

<sup>1</sup> Sparks, IX, 510-511.

constitute a National Government, without trenching on the rights reserved to the States, the root and ground work of this complex idea was the establishment of some system by which the organic law of the United States and the statutes of their Congress should be the supreme law of the land, binding everywhere and enforceable everywhere. To their minds it became clear that if justice is the basis of society, it must be so administered as to control society by operating upon all its members, and where separate States should agree to carve out of their own sovereignty the powers needed to set up a government for all, the grant of powers must be ample to make their exercise effectual. While the power of each State to punish violations of its own laws and enforce the contracts of its citizens, and maintain all the ends of government within its own territory must be exercised by State Courts and Judges and officers, without interference, a like absolute power in the Federal Government must go hand in hand with the delegation by the States of the right to regulate all those matters which were to come within the sphere of the enumerated powers of the United States. The National Government must be as competent to punish crimes forbidden by its laws and to enforce the judgments declared by its Courts as are the States within their separate boundaries in respect to their own local laws and the jurisdiction of their local Courts. More than this, the true scope of the national jurisdiction having been once established, no State should have power to make any law in conflict with the organic law, or with the statutes of the whole realm, and, still further, the National Congress itself should have no power to invade the Constitution by any enactment contravening its provisions.

It follows from these primal and essential requirements



that the American Congress could not, like the British Parliament, be omnipotent to express the will of the people by statute, nor could it, as in England by the House of Lords, or as in the State of New York by the Senate, share in the administration of the judicial power. The Judiciary, in order to hold the scales of justice with even hand, where the rights of all the citizens were concerned, and where the line of demarcation between the powers reserved and the powers granted by the States would be the subject of controversy and control, must be an independent branch of the Government, so constituted and so upheld in the high plane of its jurisdiction that its deliberative and determining faculty might be exercised in an atmosphere undisturbed by passion, prejudice or popular opinion.

"The office of the Chief Justice," said Jay, and his remark applies with equal force to every member of the Court, should be "as independent of the inconstancy of the people as it is of the will of a President;" and again he said, "in the future administration of this country the firmest security we can have against the effect of visionary schemes or fluctuating theories will be in a solid judiciary."

Accordingly when the Convention met at Philadelphia in May, 1787, there was little difference of opinion among its members as to the grant of the judicial power to be embodied in the Constitution. In respect to this they saw eye to eye; and in the early days of the Convention the "Virginia plan," presented by Edmund Randolph, the "New Jersey plan," presented by William Paterson, and the monographs of Pinckney and of Hamilton, contained almost identical provisions for the establishment of the Judiciary. The main difference of opinion arose on the propositions to give even greater powers than those finally conferred, by vesting the Supreme Court with

power to advise the other departments of the Government on important questions and on "solemn occasions" and giving them, with the Executive, a veto upon legislative acts.

Wilson, in July, 1787, moved that the Supreme National Judiciary should be associated with the Executive in the revisionary power, urging that laws might be enacted by the Legislature not so unconstitutional as to justify the Judges in denying them effect, but so unwise and dangerous as to be destructive. Madison seconded this motion, but Rutledge opposed it. "Judges," he said, "were of all men most unfit to be concerned in Revisionary Council—they ought never to give their opinions on a law until it comes before them."

The proposal was abandoned and in the discussions on the various propositions in regard to the Judiciary there was a striking unanimity among the members of the Convention in regard to all essential points.

This unanimity of sentiment was largely the result of the long training and experience of the men who made the Constitution, gained in shaping and administering the fundamental laws of their own States.

In the light of the researches stimulated by the revival of interest in American ideas which marks this Centennial epoch, we have come to see how largely the principle of growth and development which inheres in every onward movement of the race was at work in the unfolding of our organic law. The Federal Constitution was, in great part, the result of what had gone before in the making of the Colonial local governments and of the States and of the Confederacy. It was the crystallization of elements which needed only the agitation of a supreme crisis to set them in a fore-ordained and symmetrical shape. Much of the work of the Convention was

mere adaptation and adjustment of existing methods under well recognized and familiar principles.

But in the matter of the judicial power, what the framers of the Constitution did was specially their own work, original and unique. The germ was doubtless in that sense of justice and of the preservation and enforcement of individual rights which had taken such firm root in the earliest American communities, but no local growth had ever been the equivalent in any separate sphere, or the type in any attempted organization, of the complex and far-reaching system set in order by the Constitution. This work was not adaptation but creation; the workmen were not only experts but inventors. They came together with full and long and complete preparation for a task which, as it grew on their hands, gave the stimulus and inspiration for an execution which outran their first intention, but was not beyond their wisdom.

From the days of the Achaian League, antedating the Christian era, there had been alliances, compacts and confederations of nations, with external union and internal jealousies and feuds, but never a perfect union based on concentered powers, drawn from each, so as to be administered for all, and to be binding upon all. This required a step in advance from the shifting and treacherous sands of mere voluntary compact to the solid ground of organic law.

The idea of law, not as an abstract principle, but as a rule of affairs and as the supreme force in government, was native to the English-speaking race. The difference between a government of laws and a government of men, as indicated by John Adams and asserted afterwards by Marshall, was a real and not a fanciful distinction. It meant a government in which no class and no man should be superior to the law of the land and beyond its reach.

In the centuries of struggle in England between usurpation and popular right the contending parties both claimed under color of law. It has been truly said that even in the days "when the liberties of England were most nearly forgotten, acts of tyranny had to be justified with at least a show of legality."<sup>1</sup> Shakespeare puts in the mouth of Henry VIII., this rebuke addressed to Wolsey:

"We must not rend our subjects from our laws,  
And stick them in our will."

American Independence was very largely the work of lawyers. It was the standing sneer of British statesmen that so many of the leading colonists were lawyers, each one thinking himself competent to hold a brief against the Crown and Parliament, and ready to join issue on every new assertion of their power, and the colonists who were not lawyers fancying themselves statesmen, crazed with what Shrewsbury, Pitt's Irish Viceroy, described to him as the "mania for State-making."

These Colonial jurists and publicists had organized revolution on the basis of constitutional right; they had brought out of the chaos of revolt the order of the Confederation, the first crude conception of the Union of the States; they had transformed the States of the Confederation from communities in rebellion against a sovereign into sovereignties in their own right; they had waged a successful war, and had made an honorable peace, and during all these years of struggle and vicissitude they had been profound students of the problems of Liberty as secured by Law and of Law as the conservator of Liberty.

<sup>1</sup> Pollock on Jurisprudence and Ethics, London, 1882, p. 212.

Never since the Hebrew lawgiver pondered, on the plains of Midian and in the shadows of Horeb, the deliverance and leadership of an enslaved race, had there been such a period of preparation and of profound insight into human government and human rights. The Revolutionary leaders had explored all the theories of philosophers and all the annals of the race in the search for the pattern and ideal of free government, and above all they had sifted through the web and mesh of their own thought and experience the elements of the great constitutional system, "the mirror of free government," of what was still to them, in spite of its oppressions, the Mother Country.

They meditated on these things in the night watches; while they were musing the fire burned; the inextinguishable fire of patriotism which, in those lofty souls, flashed from heart to heart and mind to mind, as from peak to peak in some beleaguered land the midnight sky is lighted with the rallying fires of freedom.

The Third article of the Constitution contains the grant of judicial power. It provides, by its first section, as follows:

"The judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the Supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services a Compensation which shall not be diminished during their Continuance in Office."

This grant of power is direct from the People to the Supreme Court. As originally reported, the article made the institution of inferior Courts obligatory on Congress, but, by way of compromise, their creation was left to the discretion of the National Legislature. The appointment of the Judges

of the Supreme Court was devolved by the preceding article, on the President, by and with the advice and consent of the Senate.

The Virginia plan had vested the appointment of the Judges in the National Legislature, but this was rejected by the Convention. The New Jersey plan provided for their appointment by the President; Hamilton's plan also gave the power of their appointment to the President, but required the concurrence of the Senate, and this was finally approved by the Convention.

All the plans concurred in fixing good behavior as the tenure of office, and there was no dissent as to this departure from the English system, which displaces the Lord Chancellor with every change of administration, and makes the other Judges removable on the request of a majority of each House of Parliament. An attempt to engraft this method of removal on our judiciary system failed by a decisive vote, only one State, Connecticut, voting aye.

These wise provisions of the Constitution were in great part consonant with the organic laws of the States.

In Massachusetts, Maryland and New Hampshire, the Judges were appointed by the Executive; in New York and Pennsylvania by the Governor and the Council of appointment; in Delaware by the Governor and the Legislature, and in New Jersey, Virginia, North Carolina and South Carolina by the Legislature. In Georgia only was the idea of "Popular Justice" expressed in the Constitutional provision for an annual election of the Judges. Connecticut and Rhode Island were under the operation of their original charters, continued in force as the organic law, and which vested all power in their Governors and Assemblies.

The giving to the Senate a participation in the appoint-

ment of the Judges trenched somewhat upon the complete independence of the judicial department, but was regarded as less liable to abuse than the alternative methods of election by Congress, or appointment by the Senate alone, the former of which was proposed by Randolph, and the latter adopted, in the first instance, by the Convention, but afterwards abandoned for the provision as it now stands in the Constitution.

The life tenure, subject only to impeachment by the House of Representatives and trial before the Senate, was a substantial guaranty of the independence of the judiciary. Good behavior was the rule of the judicial tenure in the States with some exceptions, such as that of Georgia, already instanced, and New York, where, by a strange fatuity, the limit of judicial service had been fixed by the Constitution of 1777 at sixty years of age, a rule which although strenuously denounced by Hamilton and other leaders of public opinion, was perpetuated by the State in the later Constitution of 1821, with the immediate effect of driving from the Bench, in the fulness of his judicial fame, that greatest of her jurists, Chancellor Kent.

Plato, in his ideal Republic, had fixed the age of seventy as the limit of judicial service, but the framers of the Constitution, with Franklin, at the age of fourscore and one, aiding in their daily deliberations, were wiser than Plato. They agreed with Hamilton that "the mensuration of the faculties of the mind has no place in the catalogue of the known arts."

Experience has justified their conclusions. The life tenure, with the wise provision permitting retirement at the age of seventy, after ten years of service, has worked well. It has kept on the Supreme Bench jurists whose long familiarity with its duties and whose ripened wisdom have made their services invaluable to the country,—services not grudged to-

day by the members of the Court whose years outrun the three-score and ten of Scriptural limitation and of statutory privilege. During the century of its existence the Court has, in the main, been singularly fortunate in exemption from accident, casualty or premature death, and the year just closed has been marked by a signal deliverance from the hand of violence.

The genius of modern Democracy and of organized politics has fastened upon thirty-six of our forty-two States the election of their Judges by popular suffrage and for a term of years; the tenure during good behavior survives in only three States.

A partial reaction against the unwise policy of short judicial terms has modified the disadvantages of the elective system in some of the States; but their concurrent adherence to it is at variance with the Federal system, and apparently in condemnation of it. Yet no serious attempt has ever been made to dislodge from the organic law this corner-stone of the independence of the Judiciary.

After thus vesting the judicial power in the Supreme Court, and leaving to Congress the creation of inferior Courts, the Constitution proceeds, by Section 2 of Article III, to provide as follows:

“The Judicial Power shall extend to all Cases, in Law and Equity arising under this Constitution, the Laws of the United States, and the Treaties made, or which shall be made, under their Authority; to all Cases affecting Ambassadors, other public Ministers, or Consuls; to all Cases of Admiralty and Maritime Jurisdiction; to Controversies to which the United States shall be a Party; to Controversies between two or more States; between a State and Citizens of another State; between Citizens of different States; between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”



In plain terms, and in general, this means that wherever a right exists or is claimed under the Constitution or laws or treaties of the United States and is disputed, the litigants are entitled to their day in a Federal Court and must abide by its judgment. Federal Courts exist for Federal questions, and State Courts for questions not Federal; and although, in respect to many matters, they have concurrent jurisdiction, yet as to everything which draws in question a constitutional or statutory right, which is Federal and not State, there the Courts of the United States have the exclusive right of determination, and if the amount in dispute exceeds five thousand dollars, the Supreme Court is the final arbiter.

But to set the judicial power in motion there must be actual controversies and real suitors. The power granted by the Constitution and regulated by the Judiciary Act is to be exercised, not by way of advice or in the initiation of laws, or their scrutiny and comparison with the Constitution in order to their approval or disapproval at the time of their enactment, but only so far as cases shall be brought before the Court by due and orderly process of law; and while its decision is final as to the parties before it, and must be enforced as to them, it is not otherwise binding, save as it carries weight as the declared judgment of the Court, presumably to stand and be applied in all cases involving the question passed upon by the Court.

This broad delegation of power over the wide range of common law and equity cases gave to the Federal Judiciary all the power of the English Common Law Courts and the Courts of Chancery as to everything within the sphere of the National, as distinguished from the State sovereignty, and also the final right of determining whether any act of Congress contravenes the Constitution, and whether any Consti-

tution or statute of a State contravenes the Constitution or the laws of the United States.

It is under this great head of jurisdiction that the constitutional questions which have been brought before the Court have been answered and adjudicated.

The extension of the power in like manner to cases arising under treaties with foreign Governments, and to cases affecting their representatives was obviously necessary and was according to a canon of International law.

The next incident of judicial power is its extension to all cases of admiralty and maritime jurisdiction. This was an imperial grant, covering the whole vast body of the maritime law, not according to the narrow jurisdiction of the English admiralty, with its limitations of ebb and flow of tide, but according to the broad scope of the great body of the maritime law, as contained in the Codes of Continental Europe, adapting it to the ever-growing needs of commerce on our great inland waters, wherever vessels float and navigation exists.

The next grant of power was in respect to controversies to which the United States shall be a party, which necessarily must be tried in the Federal Courts. Thus far the most striking element in the powers granted is that which clothes the judiciary with the right to annul legislative enactments. Even as to this power it has been said that the Supreme Court "has no prototype in history."

"Judicial tribunals have existed as component parts of other Federal systems, but the Supreme Court of the United States is the only Court in history that has ever possessed the power to finally determine the validity of a National law."<sup>1</sup>

<sup>1</sup>Taylor's "Origin and Growth of the English Constitution," 1888, Part I, p. 73.

But in the clause next following the judicial power is extended "to controversies between two or more States."

This brief but comprehensive waiver on the part of the thirteen Sovereign States of exemption from judicial power and this mandate of the organic law, that the judicial power created by the people shall be the arbiter between the States themselves, in all their controversies with each other, mark the highest level ever attained in the progress of representative government. They have justly excited the wonder and admiration of the most intelligent observers of our Constitutional system.

Tocqueville says: "In the nations of Europe, the Courts of justice are only called upon to try the controversies of private individuals; but the Supreme Court of the United States summons sovereign powers to its bar."

John Stuart Mill declares this substitute in the organic law for war and diplomacy as the means of settling disputes between States "the first example of what is now one of the most prominent wants of civilized society, a real International Tribunal."

Pursuing the enumeration of powers, jurisdiction is further extended "to controversies between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States; and between a State, or the citizens thereof, and foreign States, citizens or subjects."

So broad and sweeping was this specification that it was claimed soon after the Constitution went into operation, that a State could itself be sued by a citizen of another State, and the claim was upheld by the Court with only one dissenting voice, in favor of a creditor of the State of Georgia.<sup>1</sup>

<sup>1</sup> February 19, 1793, *Chisholm v. Georgia*, 2 Dallas, 419.

An amendment of the Constitution was required to avoid the effect of this decision, and to secure the States in that attribute of sovereignty which prevents them from being impleaded as defendants at the suit of private citizens without their consent.

It is then declared that

“In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned the Supreme Court shall have Appellate Jurisdiction both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”

That is to say, suits can be commenced in the cases specified as in any Court of original jurisdiction. In all other cases it shall have appellate jurisdiction to review the decisions of the inferior Federal Courts and such decisions of the State Courts as are claimed to infringe the Constitution and laws of the United States.

So peaceful has been the tenor of diplomatic life in this country that the original jurisdiction of the Court has never been invoked by an ambassador or other public minister. Direct controversies between the States are comparatively infrequent. It is the appellate jurisdiction which brings before the Supreme Court contending suitors from every circuit and district of our vast commonwealth, and from every State, in cases where Federal questions are involved.

Supplementing and making sure this entire grant of power is the declaration contained in Article VI:

“This Constitution and the Laws of the United States made and which shall be made in Pursuance thereof, and all Treaties made or

which shall be made under the Authority of the United States shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding."

This brief and comprehensive declaration proposed in the convention on July 17, 1787, by Luther Martin, of Maryland, and passed unanimously, stands in the Constitution as the Bill of Rights of the Federal Judiciary. It is a nail fastened in a sure place. It would have been wholly in vain to grant the supreme judicial power to the Federal Courts without this solemn guaranty against any remaining power in the State Courts, or Judges, to nullify or impede its exercise. The supreme power must reside somewhere, and the basis of the American constitutional supremacy is nowhere better described than in Washington's terse phrase, in his letter as President of the Convention, commending the work to the approval of the States, as the "giving up a share of liberty to preserve the rest."<sup>1</sup>

Vast and far-reaching as are the powers thus granted, the same organic law which confers them provides against their abuse, by declaring the liability of the Judges to impeachment for bad behavior, and by the reserved right of the people to amend the Constitution—a right exercised in the restraint of jurisdiction imposed by the Eleventh Amendment—and, further, by the power of Congress to regulate the appellate jurisdiction. Finally, beyond and above all written boundaries and limitations of the judicial power, is the ever-present scrutiny of the people, whose instrument it is—the collective wisdom of the whole nation—that which James Wilson, of Pennsylvania, one of the ablest members of the

<sup>1</sup> Letter to Congress, Elliott, IV, 194.

Convention, and one of the first Associate Justices of the Supreme Court, called "the *mind* or *sense* of the people at large," another name for organized Public Opinion.

The nature and extent of these powers have been the theme of endless discussions without and within the precincts of the Federal Judiciary ever since the day when the Constitution was first submitted to the suffrages of the States. In the luminous essays of the Federalist; in the debates of the State Conventions called to deliberate on the new charter of Federal sovereignty; in private correspondence redolent of the patriotism of that by-gone epistolary age; in newspaper contributions teeming with lucubrations over classical *nommes de plume*; in the forensic discussions before this "more than Amphyctionic Council," the masterpieces of the leaders of the American Bar; and, most of all, in the opinions and decisions of the Court itself, its great functions as given by the organic law have been analyzed and applied and worked out into a majestic and enduring system of jurisprudence. Called into being at a time when Europe was "strewn with the wrecks of the liberties of the Past," and after all the experiments of the Confederacy had failed, the new judiciary entered upon the task of maintaining the supreme law of the Union as the controlling power in the administration of justice for the whole body of the States and for all their citizens. They were confronted on the one hand by the "epidemic frenzy of State sovereignty," with its jealousy of centralization, and on the other hand by the demand for a sure and stable system by the men who had spent their strength in the vain endeavor to uphold the tottering structure of the Confederacy, and who knew that the only safety of the Union was in the strength of its Government.

What the founders intended and what they accomplished was something wholly different from the creation of a tribunal to coerce or control the political action of the States, or to invade the exercise of their rights in the regulation of that vast department of internal government, which, for want of a better name, we call the "Police Power." They meant to create, and they created, a Court which, by its supreme authority, acting upon suitors who should invoke its power, and executing its decrees by due process of law, should be able to annul and make void any and every enactment by which Congress or any State Legislature or Constitutional Convention should infringe upon the Constitution and Laws of the United States. They meant also to provide a complete system for the administration of justice between all suitors standing in such relations of right or of citizenship as to make their controversies properly cognizable by the Federal Courts. In providing for the independence of the Judiciary, they kept it free from all share in legislation, and from all dependence on the Legislature for any original power. They knew that under the system of party government which must needs prevail, partisanship and politics would be the controlling force in legislation, and they knew how easily politics are associated with corruption. The maxim of Walpole that "every man has his price," had borne its baneful fruit in the English Parliament. The framers of the American Constitution, with a higher ideal of government, and with a civic virtue even worthier of praise than the wisdom which won for them the world's applause, strove to give this ideal form and substance and perpetuity. Above all they sought, if possible, to commit to stainless hands the unstained sword of Justice.

Not that Judges are infallible in opinion or perfect in life. The names of Jeffreys and Scroggs are synonyms of judicial

infamy, and even the great fame of Bacon is marred by his fatal lapse from integrity, but, in the main, during the eight centuries of judicial administration in England, justice has been fairly done, and the Courts of law have been the true Palladium of civil rights, and their last refuge from oppression, short of Revolution.

The Constitution wisely confined the Court to the judicial power. To the outward view this is a far narrower limit than that of the British Constitution, which makes the Lord Chancellor the presiding officer of the House of Lords, and makes Judges participants in legislation. In one sense, as has been pointed out by the senior Associate Justice now on the Bench, the Court is the weakest of all the Departments of the Government. Montesquieu declared that the judicial power "is next to nothing;" and as was said long ago by another French publicist, it "has no guards, palaces or treasures, no arms but truth and wisdom, and no splendor but the justice and the publicity of its judgments." In the Constitutional grant of its supreme judicial functions, operating with noiseless and yet with irresistible force, lies the hiding of its power.

How well the powers thus granted have been exercised, the history of the Federal Judiciary attests. In its great task of bringing the behests of the Constitution to bear on conflicting rights of suitors under the laws of the Union and the laws of the States, its records through all these hundred years, are an illustrious exhibit of that impartial and wise discrimination which constitutes the highest element of judicial wisdom. If any intelligent student of our institutions has any lingering doubt as to the safety of the reserved rights of the States of this Union as affected by the jurisdiction of the Supreme Court, let him resort to the later opinions of the Court on Constitutional questions arising since the adoption of the Four-



teenth Amendment, by which the rights of citizenship and of citizens all the land over, have been established on their new and final basis of constitutional guarantees. He will rise from their perusal disabused of his doubts, marvelling, perhaps, at the extent to which so soon after the long and bitter conflict, in which the integrity and supremacy of the Nation has been tried and tested, and made sure, the strong hand of the Supreme judiciary has upheld the exercise by the States of many disputed powers, but refreshed with a new sense of the abiding strength and wisdom of a system rigid enough to hold in union all these separate States as a Nation, and yet flexible enough to leave unimpaired the true autonomy of each.

Such is, in brief and imperfect outline, the origin of the Supreme Court of the United States, and of the grant of its judicial powers. On this centenary of its organization; in the city where its earliest jurisdiction was exercised; in the presence of the Chief Executive, of the heads of our National Legislature, of our highest State Courts and officers, of citizens representing all the activities of the country, and in the face of the world, we make profert of this high tribunal as a proof of the stability and abiding strength of our free constitutional government. As members of the Bar, and as citizens of this State and of the United States, we bring to it and bespeak for it the homage of national gratitude, and of universal respect, not so much because it has added illustrious names to the roll of the world's great jurists and magistrates, or even because it has so well upheld, in its own sphere, the honor and dignity of the Nation, as because through all these hundred years of time it has, with strict fidelity, without fear and without favor, with clean hands and with a pure purpose, served the People in the wise and patient execution of its

high trust to maintain inviolate the absolute supremacy of Justice.

At the close of Mr. Butler's address the orchestra rendered a selection from Verdi's "Aida." Mr. Hitchcock, of Missouri, was then introduced.

ADDRESS OF HON. HENRY HITCHCOCK.

"THE SUPREME COURT AND THE CONSTITUTION."

*Mr. Chairman, Mr. Chief-Justice and your Honors, Ladies and Gentlemen :*

In delivering the judgment of the Supreme Court of the United States in the case of *The State of Florida v. The State of Georgia*,<sup>1</sup> Chief Justice Taney said :

"The case, then, is this: Here is a suit between two States, in relation to the true position of the boundary-line which divides them. But there are twenty-nine other States who are also interested in the adjustment of this boundary, whose interests are represented by the United States. Justice certainly requires that they should be heard before their rights are concluded by the judgment of the Court. . . . A suit in a court of justice between such parties, and upon such a question, is without example in the jurisprudence of any other country."

This impressive statement illustrates, but only in part, the nature, the novelty and the dignity of the unexampled powers which that Court has exercised during the period of an hundred years, whose auspicious close we celebrate this day.

During that period, in more than eight thousand deliberate judgments, it has determined questions of public and private right and duty, and of the interpretation and enforcement of the Constitution and laws under which we live, many of which have deeply involved the welfare, in the past and for all time to come, not only of the people of the United States, but of unborn millions of the human race.

<sup>1</sup> At December Term, 1854: 17 Howard, 494.

It has been deemed appropriate to this commemoration that something should be said concerning the exercise of the powers of the Supreme Court since its organization. Its immense and various work cannot be even outlined here, much less commented on. At most, within the narrow limits unavoidably prescribed, one may endeavor to point out some of the broad lines along which it has kept pace with the infant nation's marvellous growth, and has dealt with exigencies unforeseen though not unprovided for, by unfolding, with firm but cautious hand, the broad and prescient purpose of the Constitution. With unfeigned diffidence, in this presence, is such a task approached.

The Supreme Court exists in virtue of the express mandate of the Constitution.<sup>1</sup> Its jurisdiction is a part of the grant of judicial power made by the people of the United States, to the new government established by them for the beneficent purposes declared in its simple and majestic preamble. Keeping separate and distinct the three great departments, the legislative, the executive and the judiciary, that instrument defines the sphere and enumerates the limited powers of each with unsurpassed simplicity, brevity and precision.

A division of the powers of government was not a political device newly invented by the statesmen who framed the Constitution of the United States. Aristotle, in the fourth book of his *Politics*,<sup>2</sup> observes that in every polity there are three departments, the suitable form of each of which the wise law-giver must consider, and according to the variation of which one State will differ from another. These he describes as,—first, the assembly for public affairs; second, the

<sup>1</sup> U. S. Constitution, Art. III, Sec. 1.

<sup>2</sup> B. IV, Ch. XIV, Gillies' Trans. (Bohn's Ed., 1853), pp. 155-6. See Woolsey Political Science, II, Ch. IX, p. 259.

officers of the State, including their powers and mode of appointment; and third, the judging, or judicial, department. The men of 1787 were familiar with this conception, in practice and in theory both. Most of them were men of large experience in the public affairs of their respective States, all which exemplified it in their charters or constitutions and the framework of their government, though differing as to degree and detail. They were also familiar with the theory of the British Constitution as expounded by Montesquieu and Blackstone. Those celebrated writers dwelt upon what Madison, in *The Federalist*,<sup>1</sup> calls "that invaluable precept," that the accumulation of all the powers of government in the same hands, whether of one, a few or many, and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny; and they held that Constitution to be an example of equilibrium secured by a division of powers. But modern English publicists<sup>2</sup> agree that Blackstone's well-known eulogy<sup>3</sup> of the British Constitution involved a complete misconception of its real character. The Government of Great Britain, carried on by a Ministry responsible to a Parliament which possesses unlimited legislative power, is a type, not of a divided, but of a single supreme authority.<sup>4</sup> The splendid, the unparalleled achievement of our forefathers lay in their successful application of that principle to the unprecedented problems before them. For not only did they distribute among three distinct and independent departments the powers of the national government, at the same time

<sup>1</sup> No. XLVII, (J. C. Hamilton's Ed., 1864), pp. 373-4.

<sup>2</sup> Bryce, *American Commonwealth*, I, pp. 26-7, 275-9: Dicey, *Law of the Constitution*, pp. 7-11.

<sup>3</sup> 1 Bla. Comm., pp. 50-1.

Dicey, *Law, &c.*, Ch. I, pp. 37-8, 65: Bagehot, *English Const'n* (2d. ed., 1873), pp. 288-9.

securing to that government absolute supremacy within its appropriate but limited sphere while preserving to the several States the autonomy and internal powers essential to their welfare; but they so framed and established the national judiciary, the weakest of those departments,<sup>1</sup> holding neither purse nor sword, strong only in the reverence of the people for the sanctions of law, as to make the courts, while strictly exercising their judicial functions in pursuance of established rules and principles of law, at once the arbiters of public and private right, and, in the words of Alexander Hamilton,<sup>2</sup> "the bulwarks of a limited constitution against legislative encroachment." The protracted debates of the Federal Convention, the masterly arguments of Hamilton, Madison and Jay in *The Federalist*, show with what patriotic anxiety, what farsighted statesmanship, they labored to accomplish that purpose. A hundred years have passed, and a great and prosperous and peaceful people rejoice in commemorating their work.

The Judiciary Department was established by the third article of the Constitution; which defines the limits of the judicial power, and vests that power in one Supreme Court and such inferior courts as the Congress may from time to time ordain and establish. Under the Judiciary Act of September 24, 1789, a masterpiece of legislation, drafted by Oliver Ellsworth,<sup>3</sup> then a Senator from Connecticut, afterwards Chief-Justice of the Supreme Court, the outlines of the Constitution were filled up and the grant of judicial power made operative. Under this Act the Supreme Court, and Circuit and District

<sup>1</sup> Alexander Hamilton, in *The Federalist*, No. LXXVIII (J. C. Hamilton's Ed., 1864), p. 576: De Tocqueville's *Democracy in America* (Reeves' Transl., 1875), Vol. I, p. 149: Mr. Justice Miller's Address on the Supreme Court, before the University of Michigan (Ann Arbor, June, 1887).

<sup>2</sup> *The Federalist*, No. LXXVIII, (J. C. Hamilton's Ed., 1864), p. 579.

<sup>3</sup> Van Santvoord's *Lives of the Chief-Justices* (Ellsworth), pp. 237-40.

Courts inferior thereto, were organized upon general lines ever since substantially adhered to.<sup>1</sup>

The jurisdiction vested in the Supreme Court by the Constitution is twofold, original and appellate.<sup>2</sup> The former includes only two classes of cases, namely, all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party.

In all other cases, its jurisdiction is appellate, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

The powers of the Court have been exercised, in by far the largest part, in virtue of its appellate jurisdiction. The vast reach and effectiveness of these powers spring, in large part, from the fact, the great and novel political fact, that the Government of the Federal Union is one which, in all its departments, operates directly upon individuals. This has been the open secret of its successful working,—this the feature which, more than any other, distinguishes it from every federal system that went before.<sup>3</sup>

The Confederation of 1781, well described as "a rope of sand," swiftly crumbled and fell to pieces when the compulsive force of a common external danger was withdrawn.<sup>4</sup> Operating only upon States, whose legislatures and officials at their own pleasure obeyed, or contemptuously disregarded, the requisitions of its Congress<sup>5</sup> and the mandates of its so-called

<sup>1</sup> See Rev. Stat. U. S. (1868), Tit. XIII, Ch. III, VII, XI.

<sup>2</sup> U. S. Const., Art. III, Sec. 2.

<sup>3</sup> "The great and incurable defect of all former federal governments is that they were sovereignties over sovereigns, and legislations, not for private individuals, but for communities in their political capacity." 1 Kent's Comm., p. 217.

<sup>4</sup> 1 Kent's Comm., p. 216. Fiske's "Critical Period," Ch. IV, "Drifting towards anarchy."

<sup>5</sup> Madison's Introduction to Debates of Federal Convention (Elliot's Ed., 1845),

courts,<sup>1</sup> its efforts to control them only invited internal strife and anarchy.<sup>2</sup>

In March and April, 1787, amid gloom so deep and general that even John Jay asked the question,<sup>3</sup> "Shall we have a king?" and when the stoutest hearts awaited with trembling hope the result of the Philadelphia Convention, James Madison, in letters to Washington, Jefferson and Randolph, submitted what he afterwards described<sup>4</sup> as—

"A sketch on paper, the earliest, perhaps, of a constitutional government for the Union, organized into regular departments, with physical means operating on individuals, to be sanctioned by *the people of the States*, acting in their original and sovereign character."

In that sketch the Constitution lay in embryo.

The judicial power of the United States, thus vested in the Supreme and inferior courts, the Constitution declares<sup>5</sup> shall extend—

"To all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority ;

"To all cases affecting ambassadors, other public ministers and consuls ;

p. 119: See 1 Bancroft's Hist. Const., p. 254. *Per* Marshall, C. J., in *Cohens v. Virginia*, 6 Wh. 388: "The requisitions of Congress, under the Confederation, were as constitutionally obligatory as the laws enacted by the present Congress. That they were habitually disregarded is a fact of universal notoriety ; with a knowledge of this fact, and under its full pressure, a convention was assembled to change the system."

<sup>1</sup> See Van Santvoord's *Lives of the Chief-Justices* (Ellsworth), pp. 201-4: compare *Penhallow v. Doane's Adm'rs*, 3 Dall. 82-5: *U. S. v. Peters*, 5 Cranch, 137.

<sup>2</sup> 1 Kent's Commentaries, pp. 216-18.

<sup>3</sup> 1 Bancroft's Hist. Const., p. 276.

<sup>4</sup> Introduction to *Debates, &c.*, Madison Papers, 5 Elliot's *Debates* (Ed. 1845), p. 120.

<sup>5</sup> U. S. Constitution, Art. III, Sec. 2.

- “To all cases of admiralty and maritime jurisdiction ;
- “To controversies to which the United States shall be a party ;
- “To controversies between two or more States ;
  - “Between a State and citizens of another State ;
  - “Between citizens of different States ;
  - “Between citizens of the same State, claiming lands under grants of different States ; and
  - “Between a State, or the citizens thereof, and foreign States, citizens or subjects.”

In one respect only have the people of the United States modified this grant of judicial power ; by the Eleventh Amendment to the Constitution, presently to be mentioned.

To the Supreme Court, “the living voice of the Constitution,” belongs the ultimate interpretation<sup>1</sup> and therefore the complete development of the powers which that instrument confers, so simple in their enumeration, so vast and varied in respect of the interests to which they relate. In fulfilling its great trust, that Court, in whatever has concerned the national welfare, has stood for the conscience of the people of the United States,—and while expounding their supreme will as expressed in the fundamental law, has enforced its self-imposed restraints for the protection of the rights which that law secures.

Within their respective spheres, all the powers granted by the Constitution are supreme.<sup>2</sup> But their sphere is limited,—*first*, by the nature of the powers themselves ; *secondly*, by the extent of the grant creating them.

The jurisdiction of a Court is defined to be, the power to

<sup>1</sup> *Martin v. Hunter's Lessee*, 1 Wheaton, 348 ; *Cohens v. Virginia*, 6 Wh. 388, 404 ; *Ableman v. Booth*, 21 Howard, 520, 525 ; *The Mayor v. Cooper*, 6 Wallace, 253. 1 Story on the Constitution, Sec. 375.

<sup>2</sup> U. S. Constitution, Art. VI. ; *U. S. v. Fisher*, 2 Cranch, 397 ; *Cohens v. Virginia*, 6 Wh. 414 ; *Gibbons v. Ogden*, 9 Wh., 196-7 ; *Tennessee v. Davis*, 100 U. S., 263.



hear and determine a cause.<sup>1</sup> That power can rightfully be exercised only for the determination of an actual controversy, brought before the Court in the form prescribed by law;<sup>2</sup> and the judicial power of the United States extends to such cases or controversies only as specified in Article III of the Constitution, or in some Act of Congress pursuant thereto. These cardinal propositions have been illustrated throughout the history of the Supreme Court, on many important occasions.

In 1792, Chief Justice Jay and his associates declined<sup>3</sup> to execute an Act of Congress which assigned to the Circuit Courts certain duties concerning pensions, not of a judicial nature: in 1851,<sup>4</sup> an Act passed in 1849 was construed upon the same principle. In 1793, Washington, upon the advice of his cabinet, embarrassed by the audacious intrigues of the French Minister Genet, requested the opinion of the Judges of the Supreme Court as to the proper construction of the treaty with France: but they declined to answer,<sup>5</sup> holding it improper to give opinions upon any controversy not brought before them in legal form. The extreme importance of this principle will become still more apparent in its relations to that great power of the Court, to declare void a law not warranted by the Constitution.

So, in cases properly brought before it, the Court has steadily disclaimed any power in the judiciary to determine

<sup>1</sup> *U. S. v. Arredondo*, 6 Pet., 709; *Rhode Island v. Massachusetts*, 12 Pet., 718; *Grignon's Lessee v. Astor*, 2 How., 338.

<sup>2</sup> 2 Story, Constitution, Sec. 1646; 1 Kent's Comm., p. 326; *Osborn v. U. S. Bank*, 9 Wh., 819; *Decatur v. Paulding*, 14 Pet., 515.

<sup>3</sup> *Hayburn's Case*, 2 Dall., 409; and see *U. S. v. Yale Todd*, 13 How., 52, *note*.

<sup>4</sup> *U. S. v. Ferreira*, 13 How., 40.

<sup>5</sup> *Marshall's Life of Washington*, Vol. V, Ch. VI, pp. 433, 441; 2 Story on Constitution, Sec. 1571.

questions of a political nature, or which involved the exercise of executive or legislative discretion,<sup>1</sup> or of the powers reserved to the States.

In a series of decisions from 1829 to 1889, involving questions arising under treaties<sup>2</sup> with various European powers, with China, and with Indian tribes, the Court has uniformly held itself concluded by the political acts of the executive and legislative departments.

Many other judgments of great importance illustrate its adherence to that general rule, in respect of the powers of Congress, of the Executive, and of the several States. Thus, in 1819, the Court affirmed, in *McCulloch v. Maryland*,<sup>3</sup> the constitutional power of Congress to create the Bank of the United States, as an appropriate means of executing undoubted powers of the government; and in *Juillard v. Greenman*,<sup>4</sup> in 1883, the power of Congress to make United States treasury notes a legal tender, as another means appropriate to that end; but in both cases held that the expediency of exercising such a power was a political question upon which the Court was not authorized to pass. In *Martin v. Mott*,<sup>5</sup> in 1827, it held that the decision of the President, under the Constitution and Acts of Congress, that an exigency had arisen for calling out the militia to repel invasion, was conclusive upon the courts. In *Kendall v. United States*,<sup>6</sup> in 1838,

<sup>1</sup> *McCulloch v. Maryland*, 4 Wheaton, 423; *Decatur v. Paulding*, 14 Peters, 516; *License Tax Cases*, 5 Wallace, 469.

<sup>2</sup> *Foster v. Neilson*, 2 Pet., 309; *U. S. v. Arredondo*, 6 Pet., 710-12; *Lattimer v. Poteet*, 14 Pet., 14, 16; *Doe v. Braden*, 16 How., 657; *Fellows v. Blacksmith*, 19 How., 372; *Phillips v. Payne*, 92 U. S., 132; *Chew Heong v. U. S.*, 112 U. S., 540; "Head Money Cases," 112 U. S., 598; *U. S. v. Rauscher*, 119 U. S., 418-19; *The Chinese Exclusion Case*, 130 U. S., 606.

<sup>3</sup> 4 Wheaton, 423.

<sup>4</sup> 110 U. S., 421, 450.

<sup>5</sup> 12 Wh., 19.

<sup>6</sup> 12 Peters, 524, 610.

it held that so far as the President's powers are derived from the Constitution he is beyond the reach of any other department except through the impeaching power: in *Decatur v. Paulding*,<sup>1</sup> in 1840, that the Secretary of the Navy can not be compelled by *mandamus* to perform an executive act involving the exercise of judgment: in *Luther v. Borden*,<sup>2</sup> in 1848, that the Court was bound by the President's decision as to which of two rival organizations was the lawful State government of Rhode Island: in *Texas v. White*,<sup>3</sup> in 1868, that the State government of Texas which Congress and the President had recognized, must be held competent to prosecute a suit in the name and behalf of that State: in *Cherokee Nation v. Georgia*,<sup>4</sup> in 1831, that even if the Cherokee Nation had been a foreign State within the meaning of the Constitution, the Court could not entertain its bill to enjoin the State of Georgia from executing laws of that State alleged to interfere with the political rights of that tribe: in *Georgia v. Stanton*,<sup>5</sup> in 1867, that the Court could not entertain a bill by the State of Georgia to enjoin the Secretary of War from carrying into execution the so-called Reconstruction Acts, since it necessarily involved the adjudication of questions and rights of a political character. Besides these, I can only allude to that highly important series of decisions from the *License Tax Cases*,<sup>6</sup> in 1866, to *Kidd v. Pearson*,<sup>7</sup> in 1888, including the *Louisiana Slaughter House Cases*,<sup>8</sup> the *Mississippi Lottery Case*<sup>9</sup> (afterwards clearly distinguished from the *New Orleans Lottery Case*<sup>10</sup>), the *Pennsylvania Oleomargarine Case*,<sup>11</sup>

<sup>1</sup> 14 Pet., 497.      <sup>2</sup> 7 Howard, 1.      <sup>3</sup> 7 Wall., 700, 732.      <sup>4</sup> 5 Pet., 1, 20.

<sup>5</sup> 6 Wall., 50.

<sup>6</sup> 5 Wall., 462.

<sup>7</sup> 128 U. S., 1.

<sup>8</sup> Butchers' Benevolent Ass'n, &c. v. Crescent City, &c., Slaughter-house Co., 16 Wall., 36.

<sup>9</sup> Stone v. Mississippi, 101 U. S., 814.

<sup>10</sup> New Orleans v. Houston, 119 U. S., 265.

<sup>11</sup> Powell v. Pennsylvania, 127 U. S., 678.

and the *Prohibitory Liquor Law Cases*, from Iowa,<sup>1</sup> Massachusetts<sup>2</sup> and Kansas,<sup>3</sup> in which, under varying circumstances, the Court steadily upheld the police power of the States, when exercised consistently with the restrictions of the Constitution.

I may not longer dwell upon this characteristic of the exercise of its powers. Omitting allusion, for the present, to the exceptional circumstances and the momentous political consequences of the opinions in the *Dred Scott Case*, the history of the Court, in that regard, may be epitomized in the impressive words of Chief Justice Chase, announcing the dismissal of the appeal in *Ex parte McCordle*:<sup>4</sup>

“Judicial duty is not less fitly performed by declining ungranted jurisdiction than in exercising firmly that which the Constitution and the laws confer.”

Turning to the affirmative exercise of its powers, how vast is the field which opens to view,—how varied, how important, how exalted the rights and duties and interests which it has determined!

Chief among those powers, and that upon which has depended the due exercise of every other, is that of interpreting the supreme law of the land,—for, as Chief-Justice Marshall said,<sup>5</sup>

“It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.”

Consider for a moment what this implied, a hundred years ago. To the Court itself, a tribunal without an example, was

<sup>1</sup> *Bartemeyer v. Iowa*, 18 Wall., 129.

<sup>2</sup> *Boston Beer Co. v. Massachusetts*, 97 U. S., 25.

<sup>3</sup> *Mugler v. Kansas*, 123 U. S., 623; *Kidd v. Pearson*, 128 U. S., 1.

<sup>4</sup> 7 Wallace, 515.

<sup>5</sup> *Marbury v. Madison*, 1 Cranch, 177.

confided the interpretation and the development of a Constitution which had no precedent. That Constitution was itself an experiment, a compromise—"extorted," as John Quincy Adams afterwards said,<sup>1</sup> "from the grinding necessities of a reluctant people;" the people of thirteen independent States, reluctant to surrender on any terms, even to a government created and controlled by themselves, the separate and jarring powers which threatened, like the warriors sprung from the dragon's teeth sown by Kadmus on Theban soil, to perish in deadly mutual strife. It has been truly said<sup>2</sup> that "the decision hung upon a single hair," even in the Philadelphia Convention, still more in some of the State Conventions which ratified its work. But the experiment was begun; the several departments of the new government assumed the exercise of the powers entrusted to each.

In the first contested case<sup>3</sup> before the Court, the State of Georgia was complainant and creditor. In the second,<sup>4</sup> that State was sued in the Supreme Court as a debtor, by Chisholm, a citizen of South Carolina, in July, 1792. His right to sue depended upon that clause of the Constitution which extended the judicial power to "controversies between a State and citizens of another State;" and similar suits, brought against other States, presented the like question.<sup>5</sup> There could have been no severer test of the wisdom, the courage or the power of the new Court. The objection angrily made to the

<sup>1</sup> Address on "The Jubilee of the Constitution," before the New York Historical Society, in 1839.

<sup>2</sup> Von Holst's Const. Hist. of U. S., Vol. I, p. 50.

<sup>3</sup> *Georgia v. Brailsford*, 2 Dall., 402.

<sup>4</sup> *Chisholm v. Georgia*, 2 Dall., 419.

<sup>5</sup> *Van Staphorst v. Maryland*, 2 Dall., 401; *Oswald v. New York*, *Id.*, 401 Pitkin states (History of U. S., Vol. II, pp. 335) that a suit was also commenced by an individual against the State of Massachusetts in the summer of 1793.

Constitution, in 1788, that under the jurisdiction which that clause conferred upon the Federal courts, the sovereignty of the State might be arraigned like a culprit at their bar,<sup>1</sup> had been met by earnest disclaimers from such Federalists as Hamilton<sup>2</sup> and John Marshall;<sup>3</sup> but that jurisdiction was now invoked in earnest. The summons, served on the Governor and Attorney-General, was ignored. The Court, "to avoid every appearance of precipitancy,"<sup>4</sup> postponed for six months the plaintiff's motion for a default. In December, the Legislature of Georgia passed resolutions flatly denying the obligation of the State either to answer the process or to obey the judgment of the Court;<sup>5</sup> and at the February Term, 1793, its solemn protest and remonstrance was presented by eminent counsel, who declined to take any part in the argument. Randolph, Attorney-General of the United States, appeared for the plaintiff, and the courageous opening sentences of his argument<sup>6</sup> show, not less plainly than contemporary records,<sup>7</sup> how intense were the alarm and excitement prevailing throughout the States, almost all of which were staggering under great burdens of debt.<sup>8</sup> After full deliberation, the judges delivered opinions *seriatim*, in which, with one dissenting voice, the jurisdiction of the Court was firmly maintained.<sup>9</sup> Judg-

<sup>1</sup> See George Mason's speech in the Virginia Convention, 3 Elliot's Debates, pp. 526-7.

<sup>2</sup> *The Federalist*, No. LXXXI (J. C. Hamilton's Ed., 1864), pp. 601-2.

<sup>3</sup> 3 Elliot's Debates (Virginia Convention), Ed. 1836, p. 555.

<sup>4</sup> 2 Dallas, 410.

<sup>5</sup> 1 Schouler's Hist. U. S., p. 274.

<sup>6</sup> 2 Dallas, 419.

<sup>7</sup> See Chief-Justice Marshall's reference to this in *Cohens v. Virginia*, 6 Wheaton, 406.

<sup>8</sup> Pitkin states that the debts of Massachusetts and South Carolina amounted to more than five and a half millions, and those of the other States together were estimated at between fourteen and fifteen millions. Hist. of U. S., Vol. II, p. 341.

<sup>9</sup> For these opinions, see 2 Dall., 429-79; Iredell, J., dissenting; Blair, Wilson and Cushing, JJ., and Jay, C. J., concurring.

ment by default was rendered against the State and an inquiry of damages ordered. Georgia responded by a statute denouncing the penalty of death against any one who should presume to execute such process within her jurisdiction.<sup>1</sup> But the threatened collision never came. The duty of the Court had been fulfilled, and its power asserted, with a dignity and courage which gave new weight to the sanctions of the Constitution. The question of changing the fundamental law was submitted to the people of the United States, in the deliberate method provided by that instrument, pending which the plaintiff made no effort to enforce the judgment; and in the case of *Hollingsworth v. Virginia*,<sup>1</sup> in 1798, the Supreme Court, declaring the Eleventh Amendment to have been constitutionally adopted, renounced "any jurisdiction, in any case, past or future, in which a State was sued by the citizens of another State, or by citizens or subjects of any foreign State."

These events have been dwelt upon, because their deeper significance was so great. The Court, upon the very threshold of its career, was confronted with that "ultimate question," so clearly discerned, so bluntly put, in the opinion of Mr. Justice Wilson, and by none more cogently answered than by Chief Justice Jay,—“Do the people of the United States form a nation?”<sup>2</sup> The judgment in that case involved not only the interpretation but the stability of the Constitution; not only the power of the Court but the endurance of the government of which it was a part. And when the people of the United States, obedient to the mandates of the Constitution, gave expression through its peaceful methods to that supreme and general will which had superseded the nerveless compact of independent and rival States, and set new limits

<sup>1</sup> 3 Dallas, 378.

<sup>2</sup> 2 Dallas, 453.

to their grant of judicial power, they affirmed by that act its reality and its value, and strengthened it for future tasks. The vital principle maintained in the *Chisholm Case* was that of the supremacy of the United States in the exercise of the judicial power, within the limits prescribed by the Constitution, whatever the Court should determine those limits to be. The Eleventh Amendment narrowed those limits in respect of what Chief Justice Jay called "the suability of a State;" but its ratification, so far from conflicting with that principle, affirmed it.

In January, 1801, John Marshall became Chief Justice. During the thirty-four years of his illustrious service, sixty-one decisions on constitutional questions were rendered by the Court, of which thirty-six were from his pen. Some of the fundamental doctrines they established, already mentioned in part, must again be referred to in general terms. But of those earlier judgments, some few call for special mention, even in a sketch so brief as this; for in them were laid, broad and deep, the foundations of American constitutional law.

In the case of *Marbury v. Madison*,<sup>1</sup> decided in 1803, the Court defined with extraordinary clearness and force the limits of the respective powers of the three great departments of the government. It was demonstrated that a legislative Act repugnant to the Constitution must be disregarded by the Courts as void; that executive officers may be compelled by the judicial power to discharge a duty clearly imposed upon them and not involving official discretion, for the government of the United States, said the Court, is a government of laws and not of men;<sup>2</sup> and that the province of the Courts is, solely, to decide on the rights of individuals, not to determine questions in their nature

<sup>1</sup> February Term, 1803, 1 Cranch, 137.

<sup>2</sup> 1 Cranch, 163. See U. S. *ex rel. McBride vs. Schurz*, 102 U. S., 378.



political, or to intermeddle with the discretion committed by the Constitution and laws to any other department.<sup>1</sup>

The case of *The United States v. Peters*, in 1809,<sup>2</sup> arose upon a controversy which first brought into open conflict the judicial power of the United States and the legislative and executive power of a State, arrayed in armed resistance to the process of the Federal Courts. Its details cannot be given here. It was a legacy from the feeble days of the Confederation, thirty years before.<sup>3</sup> The result demonstrated that the people of the United States, in adopting the Constitution of 1787, had established "a real government, operating upon persons and territory and things."<sup>4</sup> The formal judgment of the Court was simply a peremptory writ of mandamus, commanding the Judge of the District Court of the United States, for the Pennsylvania District, by proper process to enforce obedience to a judgment of that Court in favor of Olmstead and others against Serjeant and another. The real defendant was the State of Pennsylvania, which, by express legislative Act in 1801, had not only claimed the fund to which the controversy related, but, relying upon the Eleventh Amendment, expressly denied the jurisdiction of the Federal Court and the validity of its judgment, and required the Governor to resist its execution.

<sup>1</sup> 1 Cranch, 170.

<sup>2</sup> 5 Cranch, 115.

<sup>3</sup> The matter in dispute was a fund of about £11,500, part of the proceeds of the Sloop *Active*, condemned in 1777 as prize by the Pennsylvania Court of Admiralty, which awarded the entire proceeds to the State of Pennsylvania. The Committee of Appeals, established by Congress under the Confederation, reversed this decree, in favor of Olmstead and others, claimants. This judgment was contemptuously disregarded by the State officers, and remained dormant until enforced by the proceedings referred to in the text. The facts are given in the opinion of Marshall, C. J., 5 Cranch, 137. See also the opinion of Paterson, J., in *Penhallow v. Doane's Administrators*, 3 Dallas, 82-85, and Hildreth's History of the United States, Vol. III, Ch. XXII, pp. 164, 165.

<sup>4</sup> *Ex parte Siebold*, 100 U. S., 394.

The vital question involved was thus stated in the opinion of Chief Justice Marshall :<sup>1</sup>

"If the legislatures of the several States may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the Constitution itself becomes a solemn mockery ; and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals. So fatal a result must be deprecated by all ; and the people of Pennsylvania, not less than the citizens of every other State, must feel a deep interest in resisting principles so destructive of the Union, and in averting consequences so fatal to themselves."

To the argument based on the XIth Amendment, the Court replied :<sup>2</sup>

"The right of a State to assert, as plaintiff, any interest it may have in a subject, which forms the matter of controversy between individuals, in one of the courts of the United States, is not affected by this amendment ; nor can it be so construed as to oust the court of its jurisdiction, should such claim be suggested. The amendment simply provides, that no suit shall be commenced or prosecuted against a State. The State cannot be made a defendant to a suit brought by an individual ; but it remains the duty of the courts of the United States to decide all cases brought before them by citizens of one State against citizens of a different State, where a State is not necessarily a defendant."

In obedience to the mandate of the Supreme Court, the District Judge issued his writ. Its execution was obstructed by an armed force of State militia, assembled under the orders of the Governor, in pursuance of the State law. The Marshall summoned a *posse comitatus* of two thousand men, but gave time for reflection. The State authorities gave way, the troops were withdrawn, and the judgment of the Court was peacefully enforced. The supremacy of the United States

<sup>1</sup> 5 Cranch, 136.

<sup>2</sup> 5 Cranch, 139.

was further completely vindicated, notwithstanding great popular sympathy and excitement, by the speedy indictment and conviction, in the United States Circuit Court, of the officers commanding the State troops, for unlawful resistance to civil process; but the sentence of fine and imprisonment imposed upon them was wisely remitted by the President, on the ground that they had acted under a mistaken sense of duty.

Still more important was the case of *Cohens v. Virginia*, decided in 1821:<sup>1</sup> the greatest, perhaps, of those great earlier judgments in which the national supremacy, within the limits of the Constitution, was maintained by the judicial power of the United States. It directly involved the right and power of the Supreme Court, in the exercise of its appellate jurisdiction, to review and control the judgments of State Courts in cases arising under the Constitution and laws of the United States. In *Martin v. Hunter's Lessee*,<sup>2</sup> five years before, that power had been asserted by the Court, in one of Mr. Justice Story's ablest opinions, in a suit between individuals concerning a title whose validity depended upon the construction of a treaty of the United States. In *Cohens v. Virginia* was brought up by writ of error the judgment of a Virginia Court imposing a trifling fine upon the defendants below, for selling lottery tickets, contrary to a State law, but authorized, as they alleged, by an Act of Congress. Through its Attorney-General, the State of Virginia strenuously denied the jurisdiction of the Court, upon grounds whose real significance was thus set forth by the Chief Justice:<sup>3</sup>

"The questions presented to the court by the first two points made at the bar are of great magnitude, and may be truly said vitally to affect the Union. They exclude the inquiry whether the Constitution and laws

<sup>1</sup> 6 Wheaton, 264.

<sup>2</sup> 1 Wheaton, 304.

<sup>3</sup> 6 Wheaton, 377.

of the United States have been violated by the judgment which the plaintiffs in error seek to review; and maintain that, admitting such violation, it is not in the power of the government to apply a corrective. They maintain that the nation does not possess a department capable of restraining peaceably, and by authority of law, any attempts which may be made, by a part, against the legitimate powers of the whole; and that the government is reduced to the alternative of submitting to such attempts, or of resisting them by force. They maintain that the Constitution of the United States has provided no tribunal for the final construction of itself, or of the laws or treaties of the nation; but that this power may be exercised in the last resort by the courts of every State in the Union. That the Constitution, laws and treaties may receive as many constructions as there are States; and that this is not a mischief, or, if a mischief, is irremediable."<sup>1</sup>

With overwhelming power of argument these propositions were shown to be inconsistent with the Constitution and destructive of the purposes for which it was framed. One passage only can be quoted, which sets forth with matchless clearness and simplicity the relations of the general government to the States.

"That the United States form, for many, and for most important purposes, a single nation, has not yet been denied. In war, we are one people. In making peace, we are one people. In all commercial regulations, we are one and the same people. In many other respects, the American people are one; and the government which is alone capable of controlling and managing their interests, in all these respects, is the government of the Union. It is their government, and in that character they have no other. America has chosen to be, in many respects, and to many purposes, a nation; and for all these purposes her government is complete; to all these objects, it is competent. The people have declared, that in the exercise of all powers given for these objects, it is supreme. It can, then, in effecting these objects, legitimately control all individuals or governments within the American territory. The constitu-

<sup>1</sup>6 Wheaton, 377.

tion and laws of a State, so far as they are repugnant to the Constitution and laws of the United States, are absolutely void. These States are constituent parts of the United States. They are members of one great empire—for some purposes sovereign, for some purposes subordinate.”<sup>1</sup>

In other famous judgments the Court laid down the rule in accordance with which should be exercised its great power of interpreting the supreme law of the land. Thus, in *United States Bank v. Deveaux*,<sup>2</sup> it declared,—

“The duties of this Court, to exercise jurisdiction where it is conferred, and not to usurp it where it is not conferred, are of equal obligation. The Constitution, therefore, and the law, are to be expounded, without a leaning the one way or the other, according to those general principles which usually govern in the construction of fundamental or other laws.”

In *Gibbons v. Ogden*,<sup>3</sup> it said,—

“The enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said. If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well settled rule that the objects for which it is given, especially when those objects are expressed in the instrument itself, should have great influence in the construction. . . . We know of no rule for construing the extent of such powers, other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred.”

In *Ogden v. Saunders*,<sup>4</sup> the rule was thus stated,—

“To say that the intention of the instrument must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for

<sup>1</sup> 6 Wheaton, 413-14.

<sup>2</sup> 5 Cranch, 87.

<sup>3</sup> 9 Wheaton, 188.

<sup>4</sup> 12 Wheaton, 332.

whom the instrument was intended ; that its provisions are neither to be restricted into insignificance nor extended to objects not comprehended in them, nor contemplated by its framers ; is to repeat what has been already said more at large and is all that can be necessary."

I cannot further enumerate those earlier judgments, or dwell upon the successive steps by which the brief and pregnant clauses of the Constitution were interpreted and developed by the Court. During more than four-score years, in many other important judgments, from the decision in *Marbury v. Madison*, in 1803, to the *Chinese Exclusion Case*,<sup>1</sup> in 1889, under widely varying circumstances, it has steadily maintained the supremacy of the United States within its appropriate sphere.<sup>2</sup> It was the surpassing good fortune of the people of the United States—rather let us say an earnest of their guidance by a benign and superior Power,—that during the formative period of their history, for an entire generation, this was mainly the work of the great Chief Justice, whose acute and powerful intellect, whose exalted purity of character, whose rare union of unflinching courage with judicial caution, and whose wide and varied experience, at home and abroad, in the service of his State and of the United States, peculiarly fitted him for such a task. Beacon-lights of the nation's jurisprudence, illuminating with prophetic radiance the dark waters of the distant future, those luminous judgments have shone out,

<sup>1</sup> 130 U. S., 581.

<sup>2</sup> See, among others, the *Chinese Exclusion Case*, 130 U. S., 604, citing *Cohens v. Virginia*, 6 Wheaton, 413, and *Knox v. Lee*, 12 Wallace, 555; also *Bowman v. Chicago R'y Co.*, 125 U. S., 465 (reviewing many cases); *Philadelphia SS. Co. v. Pennsylvania*, 122 U. S., 326; *Wabash, &c., R'y Co. v. Illinois*, 118 U. S. 557; *Yick Wo v. Hopkins*, *Ib.*, 356; *Ex parte Yarbrough*, 110 U. S., 666; *Tennessee v. Davis*, 100 U. S., 263; *Ex parte Virginia*, *Ib.*, 346; *Ex parte Siebold*, *Ib.*, 392-4; *Railroad Co. v. Hudson*, 95 U. S., 465; *Tarble's Case*, 13 Wall., 406-7; *Ableman v. Booth*, 21 How., 517; *Brown v. Maryland*, 12 Wh., 448; *Gibbons v. Ogden*, 9 Wh., 196-7; *McCulloch v. Maryland*, 4 Wh., 405.

and still shine for us afar, marking out its course, warning it of perils on either hand,—the quicksands of legislative or executive encroachment, and the dangerous opposing reefs of uncontrolled State sovereignty, white with the breakers of anarchy and civil war.

The jurisdiction of the Supreme Court, already distinguished as original and appellate, may be regarded from another point of view. In that great opinion in *Cohens v. Virginia*, Chief Justice Marshall pointed out<sup>1</sup> that jurisdiction is given to the Courts of the Union in two classes of cases. In one class, it depends on the character of the parties, whatever the controversy may be: in the other, upon the character of the cause, whoever may be the parties. In the former, a hearing is secured to citizen and alien alike, unbiased by the prejudices of locality; while to the proudest State of the Union, and to the representatives of friendly foreign States, is afforded a tribunal of appropriate dignity. In cases arising under the latter, for the most part, have come before the Court those great controversies affecting the national peace and harmony, the necessity for whose adjustment brought about the compromises of the Constitution. It is in the development and application of the powers relating to these, that the most important and characteristic work of the Court has been performed.

Few and simple are the express provisions of the Constitution upon which their efficiency mainly rests. They are, that the judicial power of the United States shall extend to every case, in law and equity, arising under the Constitution, laws and treaties of the United States; and that the Constitution and the laws and treaties made in pursuance thereof "shall be the supreme law of the land and the judges in every State shall be bound thereby."<sup>2</sup>

<sup>1</sup> 6 Wheaton, 378.

<sup>2</sup> U. S. Constitution, Art. VI.

From these, by inevitable consequence, developed and applied by the Court as each case has arisen, it follows that the judicial power of the United States, like the legislative and executive, each within its prescribed limits, operates directly upon individuals; that it controls the unauthorized judgments of State Courts; and that it must declare and treat as void any law, State or Federal, not warranted by the Constitution.

Without these powers, the government of the Union could not endure. Lacking them, the Confederation fell to pieces, a barrel without hoops, a government only in name. To us, the beneficent consequences of their exercise are so familiar that we do not always realize their transcendent importance, or the jealous apprehensions which they at first encountered. But such acceptance of them is the result of a century of judicial decisions: and it illustrates both the tenor of those decisions, and the reverence for law which is at once the characteristic of the American people and the indispensable condition upon which their liberties must be maintained.

More than seventy years have passed since the Supreme Court first vindicated, in *Martin v. Hunter* and *Cohens v. Virginia*, its power and duty under the Constitution and laws of the United States, to review and control the judgments of State courts by which should be denied any right or privilege claimed under the authority of the United States.

No power of the Court has been more jealously opposed: for against it were often arrayed the angry passions and prejudices aroused by State pride and fostered by local interests. A remarkable illustration of this is found in the controversy, sixty years ago, between the State of Georgia and the Cherokee tribe of Indians,<sup>1</sup> the details of which belong to the political

<sup>1</sup> See *Cherokee Nation v. Georgia*, 5 Peters, 15; *Worcester v. Georgia*, 6 Peters, 515, 561.



history of the country. Still more threatening was the opposition to it growing out of the controversies relating to slavery.<sup>1</sup> But no power of the Court has been more firmly maintained, or is now more completely established and acknowledged.

But while thus maintaining the just supremacy of the Constitution and laws of the United States, the Court has with equal emphasis upheld the authority of State officers and State courts in their appropriate and independent sphere,<sup>2</sup> and asserted the paramount duty<sup>3</sup> of both State and Federal courts to "co-operate as harmonious members of a judicial system co-extensive with the United States."

A power so unique, so far-reaching, was never before exercised by any tribunal. Springing from our dual system, of which it is at once a characteristic and an essential feature, it is a purely judicial, never a political power. Under circumstances infinitely various, it has protected the personal rights to life, liberty and property which are guaranteed by the Constitution; while its uniform and benignant operation has proved—in the words of Chief Justice Marshall—<sup>4</sup>

"indispensable to the preservation of the Union, *and consequently*, of the independence and liberty of these States."

No exercise of the judicial power has excited among for-

<sup>1</sup> *Ableman v. Booth*, 21 Howard, 506.

<sup>2</sup> See among others, *Kidd v. Pearson*, 128 U. S. 1; *Mugler v. Kansas*, 123 U. S. 623; *Beer Co. v. Massachusetts*, 97 U. S. 25; *Bucher v. Cheshire R. R. Co.*, 125 U. S. 584; *Morgan S. S. Co. v. Louisiana, Board, &c.*, 118 U. S. 455; *Coe v. Erroll*, 116 U. S. 517; *N. O. Gaslight Co. v. Louisiana Light Co.*, 115 U. S. 650; *Barbier v. Connolly*, 113 U. S. 27; *Stone v. Mississippi*, 101 U. S. 814; *Patterson v. Kentucky*, 97 U. S. 501; *Slaughterhouse Cases*, 16 Wall, 36; *Texas v. White*, 7 Wall, 700; *Mayor of New York v. Miln*, 11 Peters, 102; *License Cases*, 5 How. 504.

<sup>3</sup> See *Ex parte Royall*, 117 U. S. 252; *Covell v. Heyman*, 111 U. S. 182; *Burgess v. Seligman*, 107 U. S. 34; *Taylor v. Carryl*, 20 How. 595.

<sup>4</sup> *Craig v. Missouri*, 4 Peters, 438.

eign jurists so great admiration as that by which is treated as void and inoperative a law repugnant to the Constitution: a power habitually exercised by both State and Federal courts, and familiar to Americans.

Neither the Federal nor any State constitution in terms grants such a power. It results from established legal principles, whenever the mandate of an inferior conflicts with that of a superior legislative authority; whether the former be a corporate by-law or municipal ordinance transgressing the charter, or a legislative enactment in disregard of constitutional limitations. In exercising it, the Court simply fulfils its judicial duty of declaring the supreme law and applying it to the case in hand. Hence its limits are,—that it can not be invoked until such a case has arisen for judicial determination; that only in such a case can it be exercised; and that in such case, accurately speaking, the Court determines only the rights of the parties thereto.

It is therefore essentially a law-interpreting, not a law-making power. It secures obedience to the mandates of the Constitution by substituting for the discussion of pending measures of legislation or abstract theories of government, and for dangerous conflicts between officers of State or aspirants for power, the deliberate adjudication of concrete rights by an impartial tribunal, invoked not at the will of the judge but at the demand of the parties concerned.

Recent English writers of high repute have remarked,<sup>1</sup> and with truth, that this feature of our system was not novel nor original with the framers of the Federal Constitution. Such a power had been asserted by State courts before 1787.<sup>2</sup>

<sup>1</sup> Bryce, *The American Commonwealth*, Vol. I, p. 250; Dicey, *Law of the Constitution*, p. 151.

<sup>2</sup> *Trevett v. Weedon*, decided in 1786 by the Superior Court of Rhode Island,

It was so clearly recognized, in principle, in the debates of the Federal Convention, that it was one ground of their sagacious rejection of the proposal<sup>1</sup> to confer upon the judiciary, jointly with the executive, the power of negating legislative Acts. But in this, as in other respects, that which justifies Mr. Gladstone's well-known eulogy of the American Constitution as "the most wonderful work ever struck off at a given time by the brain and purpose of man," is not that its framers invented new methods of government, or attempted to impose Utopian theories upon a reluctant people, but that in constructing a new Federal system, beyond all precedents, they made use, with unexampled skill, of existing institutions, inherited traditions and modes of thought sanctioned by established laws, so adapting these to the new exigencies that the new order should not abruptly break with the old, but should be in truth its highest development and richest fruit.

In the great case of *Marbury v. Madison*, already mentioned, the Court first formally asserted the power last men-

is cited in Cooley's *Constitutional Limitations*, p. 160, Note 3, as the earliest decision of this kind. A similar decision by the Supreme Court of New Jersey, in 1780, is mentioned by Prof. H. W. Rogers in his Introduction (p. 10) to the *Lectures on the Constitutional History of the United States*, delivered at the University of Michigan in 1889.

<sup>1</sup>See Luther Martin's objections to the "double negative" it would give to the judges; Elliot's *Debates*, Vol. V, pp. 346-7; also, Bancroft's *History of U. S. Constitution*, Vol. II, pp. 195-6. The proposition to associate the judges with the executive as a council to revise laws was part of Randolph's original plan. It was supported by Madison, Ellsworth, Mason and James Wilson, by whom it was unsuccessfully renewed; see Elliot's *Debates*, Vol. V, pp. 128, 151, 155, 164-6, 344-9. The power of the courts, under a written constitution, to pass upon the validity of legislative Acts, was distinctly recognized in the Federal Convention, by Gerry, Luther Martin, Mason, Morris and Madison (Elliot's *Debates*, Vol. V, pp. 151, 346-7, 355-6); also in the Virginia Convention, by Patrick Henry, Marshall and Grayson (*Ib.*, Vol. III, pp. 539, 540, 553, 567); also by Hamilton in *The Federalist*, No. LXXVIII.

tioned, upon grounds so lucidly and impregably set forth that it has never been questioned. Since then it has been exercised in more than two hundred cases; in twenty of which Acts of Congress, in the remainder many legislative and municipal enactments in thirty-four of the States, were held void as repugnant to the Constitution or laws of the United States.<sup>1</sup> With far greater frequency this power has been invoked in vain:<sup>2</sup> for the maxim of the Court, from the first, has been that it should never "on slight implication or vague conjecture" pronounce an Act of the Legislature void, nor unless upon "a clear and strong conviction of its incompatibility with the Constitution."<sup>3</sup> But when we consider the amazing growth of the nation, in numbers, in wealth, and in territory, which these cases reveal, still more the phases of its history and the variety and vast importance of the controversies to which they relate, how impressive an illustration do they afford of the enlarging scope and influence of the powers exercised by the Court since its organization, and its relations to the jurisprudence of the country! For they exemplify not only its power to determine the validity of a State law or constitutional provision, as well as its power to review the judgments of State courts, often concurrently exercised, but also the enforcement by it of both classes of restrictions upon the States, as well those expressly declared in the Constitution as those necessarily implied from the powers granted to Congress.

Take, for one example, that vital and ever-enlarging ques-

<sup>1</sup> For a list of these cases, see Appendix (p. ccxxxv). to Vol. 131 of U. S. Reports.

<sup>2</sup> See Mr. Justice Miller's remarks in the Trade-Mark Cases, 100 U. S. 96.

<sup>3</sup> *Fletcher v. Peck*, 6 Cranch, 128; *Dartmouth College v. Woodward*, 4 Wheaton, 625; Trade-Mark Cases, 100 U. S. 96.

tion of the power of Congress to regulate commerce with foreign nations and between the several States. In the case of *Gibbons v. Ogden*,<sup>1</sup> in 1824, the Court reversed a judgment of the New York Court of Errors, upholding a law of that State which was held to conflict with this power as exercised by Congress. In that case, in one of Chief-Justice Marshall's most celebrated opinions, the Court first expounded that brief "commerce clause," which embodies one of the great compromises of the Constitution; setting forth with extraordinary clearness and force not only its scope and meaning, but the relations between the States and the general government, and the rule by which the Constitution should be interpreted. Upon that foundation rest hundreds of later judgments, successively determining the questions, ever new, presented by the vast commercial development of the country, especially of the commerce between the States, by methods of communication not yet imagined a hundred years ago. Fifty-one of these judgments declared void enactments in nineteen States, as regulations of commerce. Far down in that list is the *Pensacola Telegraph Case*,<sup>2</sup> citing and still further developing the principles announced in *Gibbons v. Ogden*, fifty-three years before. In this case was held exempt from State control an instrumentality of commerce unknown even to Science in the days of Marshall: but whose slender wires, girdling the continent, now closely bind this ancient Empire State and her Atlantic sisters to those new empires of the Pacific coast, and those from whose mountain tops flashed out but yesterday the splendor of the twin constellations newly emblazoned upon the azure symbol of the Union which embraces them all. "The powers of Congress," said the Court,

<sup>1</sup> 9 Wheaton, 1.

<sup>2</sup> *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1, 9.

in that case, "are not confined to the instrumentalities of commerce known or in use when the Constitution was adopted, but keep pace with the progress of the country." In the exercise of its powers, the Court has kept pace with both,—whether in determining the great and novel questions of public welfare and State control growing out of the enormous development of the steam railway, another of those new Titans in the service of modern civilization,<sup>1</sup> or in construing the laws which govern the vast commerce upon our inland seas.

Reluctantly passing over many other important examples under these heads, I cannot omit one which strikingly illustrates the development of the Constitution, and the deliberate but bold and timely steps by which the extent of the judicial power of the United States has been determined. That power is declared by the Constitution to extend "to all cases of admiralty and maritime jurisdiction." Chief Justice Marshall held, in 1828,<sup>2</sup> that this was a class of cases distinct from those "arising under the Constitution and laws of the United States;" that cases in admiralty do not, in fact, arise under that Constitution or those laws, but are as old as navigation itself; and that the law, admiralty and maritime, as it has existed for ages, is applied by our courts to these cases as they arise. But it was applied, at first, in accordance with the rule adopted from the English courts, making tide-water the test and limit of navigation, and consequently the boundary of admiralty jurisdiction. Such was the fact in England, and practically the fact in the United States, when the Constitution was ratified. But the hardy pioneers of the great

<sup>1</sup> See, among others, *Munn v. Illinois*, 94 U. S. 113; *Chicago, &c., R. R. Co v. Iowa*, *Ib.*, 155; *Railroad Commission Cases*, 116 U. S. 307; *Wabash, &c., R Co. v. Illinois*, 118 U. S. 557.

<sup>2</sup> *American Insurance Co. v. Canter*, 1 Peters, 545-6.

West were already swarming over its mountain barriers, conquering the wilderness, driving out the savage, and soon floating their peltry-laden flat-boats down its great rivers to the Gulf. The energy of another generation converted those national waterways into the busy avenues of a fast-developing commerce, conducted by the resistless power of steam upon thousands of miles of inland waters. From the vast territory bordering upon these, new States were successively carved, whose inharmonious laws, administered by separate tribunals, began to fetter that commerce in its growth. For a time the English rule was adhered to; but more and more the need was felt for the uniform and settled rules of admiralty jurisdiction. In the case of *The Genesee Chief*,<sup>1</sup> in 1851, the question again arose; the grounds and reason of that rule were re-examined by Chief Justice Taney, their insufficiency demonstrated in a masterly judgment, and the exclusive admiralty jurisdiction of the United States over all inland waters in fact navigable was established, and has ever since been maintained.<sup>2</sup>

But the Constitution was also ordained "to establish justice." Conspicuous among the evils it was designed to remedy were those resulting from laws passed by various States interfering with contracts. These were dwelt upon by Hamilton in *The Federalist*,<sup>3</sup> as a cause not only of injury to individuals but of hostility between the States; and long afterwards mentioned by Madison<sup>4</sup> among "the defects, the deformities, the diseases,

<sup>1</sup> 12 Howard, 443.

<sup>2</sup> In *The Hine v. Trevor*, 4 Wallace, 562, affirming *The Genesee Chief*, in 1866, a very interesting account is given by Mr. Justice Miller of the course of the decisions on this subject. Both these cases were affirmed in *The Eagle*, 8 Wallace, 15, in 1868, since when the question has seldom arisen.

<sup>3</sup> *The Federalist*, No. VII.

<sup>4</sup> See Madison's Introduction, &c., Elliot's Debates, Vol. V, p. 120.

for which the Convention were to provide a remedy," and described by Marshall<sup>1</sup> as—

"a mischief so great, so alarming, as not only to impair commercial intercourse, and threaten the existence of credit, but to sap the morals of the people and destroy the sanctity of private faith."

Hence the express restriction<sup>2</sup>—"No State shall pass any law impairing the obligation of contracts." This provision the Court has enforced in some of its most famous judgments. Fifty-seven such decisions have been rendered, declaring void enactments in twenty-two States: the earliest in *Fletcher v. Peck*,<sup>3</sup> in 1810; the most famous in 1819,—the *Dartmouth College Case*,<sup>4</sup> in which the charter of an eleemosynary corporation was upheld as a contract inviolable by subsequent State legislation. The doctrines of this case, in the words of Chief Justice Waite, sixty years later—<sup>5</sup>

"have become so embedded in the jurisprudence of the United States as to make them to all intents and purposes a part of the Constitution itself."

Many later judgments have enforced these doctrines; not more by upholding against State legislation the sanctity of a contract once clearly established, than by maintaining the right and duty of each State, in harmony with the Constitution, to control its internal affairs and to care for the health, the morals, the education and the good order of its people.

Differing in subject but akin in spirit and principle, have

<sup>1</sup> In *Ogden v. Saunders*, 12 Wheaton, 355.

<sup>2</sup> U. S. Constitution, Art. I, Sec. 10.

<sup>3</sup> 6 Cranch, 87.

<sup>4</sup> 4 Wheaton, 518.

<sup>5</sup> *Stone v. Mississippi*, 101 U. S. 816.



been the judgments, from *Worcester v. Georgia*,<sup>1</sup> in 1832, to *United States v. Kagama*, in 1885, and *The Choctaw Nation v. The United States*,<sup>2</sup> in 1886, in which the Court has earnestly affirmed the power and duty of the United States to protect the Indian tribes, helpless and dependent wards of the Nation, against violence from local ill-feeling or oppression by State power.

Widely differing from both as to subject and parties, but still fulfilling that great purpose "to establish justice," have been its judgments determining, as between States of the Union, the location of their boundaries. Controversies of that nature were pending between eleven States<sup>3</sup> when the Constitution was framed. Seven such suits, in which States of the Union were plaintiff and defendant,<sup>4</sup> have been determined by the Supreme Court, aside from the settlement of such disputes by compact between the States, assented to by Congress,<sup>5</sup> and from their determination in suits between individuals.<sup>6</sup> Upon leave granted at its present term, the State of Virginia filed in that Court, but the other day, its bill in equity against the State of Tennessee, for a decree establishing the boundary between them; the averments of which plainly disclose the beneficent character of the jurisdiction invoked, and its alter-

<sup>1</sup> 6 Peters, 515. See also *Fellows v. Blacksmith*, 19 How., 366; *The Kansas Indians*, 5 Wall., 737; *the New York Indians*, *Id.* 761.

<sup>2</sup> 119 U. S., 1, affirming 118 U. S., 375.

<sup>3</sup> Per Baldwin, J., in *Rhode Island v. Massachusetts*, 12 Peters, 724. This learned opinion discusses this interesting subject very fully from a historical point of view, as well as the question of jurisdiction involved.

<sup>4</sup> The cases referred to are, *New Jersey v. New York*, 3 Peters, 461, 5 Pet., 284, 6 Pet., 323; *Rhode Island v. Massachusetts*, 4 Howard, 591; *Missouri v. Iowa*, 7 How., 660; *Florida v. Georgia*, 17 How., 478; *Alabama v. Georgia*, 23 How., 505; *Virginia v. West Virginia*, 11 Wallace, 39; *Missouri v. Kentucky*, 11 Wall. 395.

<sup>5</sup> See *Ex parte Devoe Manufacturing Co.*, 108 U. S., 401, 410.

<sup>6</sup> As in *Handly v. Anthony*, 5, *Wheaton*, 374; *Jones v. Soulard*, 24 *Howard*, 41.

native of violence and bloodshed. Unexampled, indeed, in the history of jurisprudence, are such suits, between such parties, before such a tribunal.

Two of the three great compromises of the Constitution were made with slavery; an institution then believed to be slowly dying, and whose evils have seldom been depicted in words more powerful or more prophetic than those of George Mason, of Virginia, in the Federal Convention of 1787.<sup>1</sup> No man could then foresee the industrial revolution destined to give it new life,—the consequent increase of its power, its ceaseless struggles for extension, the legislative compromises successively made in vain, or the fierce political controversies growing more and more dangerous through two generations. The Kansas-Nebraska Act of 1854, repealing the so-called Compromises of 1820 and 1850, re-lit the smoldering fires, and hastened that conflict, long postponed, but some day inevitable under eternal laws. The decision by the Supreme Court, in the *Dred Scott Case*,<sup>2</sup> of questions incapable, under such circumstances, of judicial settlement, added fuel to the flame. At the dreadful cost of four years of civil war, that supremacy of the nation was forever vindicated which the Court, through Marshall, had demonstrated, and through Taney had maintained. By their own appeal to arms the

<sup>1</sup>In the debate concerning the slave trade, August 22, 1787. "This infernal traffic," said Mason, "originated in the avarice of British merchants. . . . Slavery discourages arts and manufactures. The poor despise labor when performed by slaves. They prevent the emigration of whites, who really enrich and strengthen a country. They produce the most pernicious effect on manners. Every master of slaves is born a petty tyrant. They bring the judgment of heaven on a country. As nations cannot be rewarded or punished in the next world they must be in this. By an inevitable chain of causes and effects, Providence punishes national sins by national calamities." Elliott's Debates, Vol. V, p. 458.

<sup>2</sup>*Dred Scott v. Sandford*, 19 Howard, 393.

advocates of secession and the defenders of slavery had brought about the destruction of both.<sup>1</sup>

Peace was restored, and the people of the United States inscribed in their fundamental law new guarantees of universal liberty, of citizenship, and of the equal protection of the laws. New and grave problems arose,—not all yet solved, and capable of solution only by a people whose reverence for law shall peacefully secure to every citizen the rights which neither force nor fraud can permanently deny.

With the new order and the new legislation, State and National, which that demanded, new questions have arisen for judicial determination. In many important judgments, including some already mentioned, the Court has further expounded as well the constitutional rights of the citizen as the enlarged powers and duties of the general government and its relations to the political communities whose people established, a hundred years ago, "an indestructible Union composed of indestructible States."<sup>2</sup> The limits of an occasion like this forbid even a summary of those judgments: but their nature and importance may be impressively illustrated by a glance at the subjects to which some of them relate.

By means of that great writ of *habeas corpus*, the Court has maintained, as against executive power acting through a military commission, the right of the citizen to trial by jury.<sup>3</sup> Re-affirming the cardinal principles of political liberty and personal security for which our forefathers contended against arbitrary power, it has prohibited<sup>4</sup> unreasonable searches or

<sup>1</sup> See the remarks of Bradley, J., in *Knox v. Lee*, 12 Wallace, 555.

<sup>2</sup> *Texas v. White*, 7 Wallace, 725.

<sup>3</sup> *Ex parte Milligan*, 4 Wallace, 2.

<sup>4</sup> *Boyd v. United States*, 116 U. S., 616, 625; citing Lord Camden's judgment in *Entick v. Carrington*, 19 Howell's St. Tr., 1029.

seizures, and the compulsory production by the citizen of evidence tending to criminate himself. It has annulled, as *ex post facto* and as within the constitutional inhibition against bills of attainder, new test oaths and penalties imposed by Congress and by the States.<sup>1</sup> It has protected the citizen against unlawful imprisonment under color of the legislative power of Congress, while maintaining unimpaired its privileged freedom of debate.<sup>2</sup> As against Congress and the States alike, it has forbidden the taxing power of either to impede the exercise by the other of its appropriate functions of government.<sup>3</sup> It has enforced, as against State laws and constitutions, the obligation of lawful contracts,<sup>4</sup> while declaring utterly void those intended to aid the Rebellion,<sup>5</sup> and refusing to recognize, as contracts, improvident grants by State legislatures of privileges inconsistent with the rightful authority of the State or its duty to its people.<sup>6</sup> It has applied the doctrines of that great judgment in *Gibbons v. Ogden* to the new methods and more powerful instrumentalities of modern commerce, expounding and enforcing

<sup>1</sup> *Ex parte Garland*, 4 Wallace, 333; *Cummings v. Missouri*, *Id.*, 277; *Pierce v. Carskaddon*, 16 Wallace, 234.

<sup>2</sup> *Kilbourn v. Thompson*, 103 U. S., 168.

<sup>3</sup> As to the power of Congress, see *Buffington, Collector &c., v. Day*, 11 Wall., 113; *United States v. Balt. & O. R. R.*, 17 Wall., 322. As to the taxing power of the States, see the learned and exhaustive opinion of Mr. Justice Gray in *Van Brocklin v. State of Tennessee*, 117 U. S., 151, reviewing many prior decisions; also *McCulloch v. Maryland*, 4 Wheaton, 316; *Osborn v. Bank of United States*, 9 Wh., 738; *Weston v. Charleston*, 2 Peters, 449; *Bank of Commerce v. New York*, 2 Black, 620; *Van Allen v. The Assessors*, 3 Wall., 563.

<sup>4</sup> *Furman v. Nichol*, 8 Wall., 44; *Home of the Friendless v. Rowse*, *Id.* 430; *Poindexter v. Greenhow*, 114 U. S., 270; *Royall v. Virginia*, 116 U. S., 572; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S., 650.

<sup>5</sup> *Coppell v. Hall*, 7 Wall., 542; *Texas v. White*, 7 Wall., 700; *Hanauer v. Woodruff*, 15 Wall., 439; *Taylor v. Thomas*, 22 Wall., 479; *Radich v. Hutchins*, 95 U. S., 210.

<sup>6</sup> *Fertilizing Co. v. Hyde Park*, 97 U. S., 659; *Stone v. Mississippi*, 101 U. S., 814; *Butchers' Union, &c. Co. v. Crescent City, &c. Co.*, 111 U. S., 746.

the new legislation made necessary by its enormous growth:<sup>1</sup> and has defined the powers which the States may lawfully exercise for the control and regulation of private property so used, or a business so carried on, as that the public interest is affected thereby.<sup>2</sup> Interpreting the recent amendments to the Constitution in the light of the wrongs they were designed to remedy,<sup>3</sup> it has shielded citizen and alien alike, of every race and color, against unequal laws and oppressive ordinances;<sup>4</sup> but while upholding the power of Congress to enforce them by "corrective legislation," has denied its right to supersede the legislatures of the States.<sup>5</sup> Strongly asserting the right of the United States, by means both of the legislative and of the judicial power, to guard the purity of national elections,<sup>6</sup> and to protect the officers and agents of the nation in the discharge of every duty, and steadily upholding the supremacy of the general government, within its sphere, over all persons and territory and things throughout the Union,<sup>7</sup> it has not less firmly maintained the power and duty of each

<sup>1</sup>See the following among other cases: *Chy Lung v. Freeman*, 92 U. S., 275; *Telegraph Co. v. Texas*, 105 U. S., 460; *People v. Compagnie Generale*, 107 U. S., 59; *Walling v. Michigan*, 116 U. S., 446; *Pickard v. Pullman Southern Car Co.*, 117 U. S., 34; *Wabash &c. R. R. Co. v. Illinois*, 118 U. S., 557; *Ratterman v. Western Union Telegraph Co.*, 127 U. S., 411; *Leloup v. Port of Mobile*, *Id.*, 640; *Asher v. Texas*, 128 U. S., 129.

<sup>2</sup>*Munn v. Illinois*, 94 U. S. 113; *Chicago, &c. R. Co. v. Iowa*, *Id.*, 155; *Stone v. Farmers' Loan & Trust Co.* ("Railroad Commission Cases"), 116 U. S. 307-356.

<sup>3</sup>*Slaughter-house Cases*, 16 Wall, 36; *Strauder v. West Virginia*, 100 U. S. 303; *Civil Rights Cases*, 109 U. S. 3.

<sup>4</sup>*Strauder v. West Virginia*, 100 U. S. 303; *Ex parte Virginia*, 100 U. S. 339; *Neal v. Delaware*, 103 U. S. 370; *Yick Wo v. Hopkins*, 118 U. S. 356.

<sup>5</sup>*United States v. Reese*, 92 U. S. 214; *United States v. Cruikshank*, 92 U. S. 542; *Civil Rights Cases*, 109 U. S. 3; 13.

<sup>6</sup>*Ex parte Siebold*, 100 U. S. 371; *Ex parte Clarke*, 100 U. S. 399; *Ex parte Yarbrough*, 110 U. S. 651.

<sup>7</sup>*Ex parte Siebold*, 100 U. S. 386, 393-4.

State, within its proper sphere, to legislate for the welfare of its people. In its own terse phrase, the Court "has held with a steady and an even hand the balance between Federal and State power."<sup>1</sup>

From this imperfect sketch may be gathered how vast are the powers in the exercise of which the Court has expounded and has enforced those principles of constitutional liberty upon which securely rest the political and personal rights of the people of the United States, whether regarded as individuals, or as citizens of the United States, or as citizens of the several States. To no other tribunal have such powers ever been confided; for the political system of which it forms a part is without example in the past. But when the history of the Court shall be written, to these unique functions must be added those which it has also constantly fulfilled in determining the important and far more numerous questions of private right and duty which have come before it. Exercising in the last resort that jurisdiction, conferred by the Constitution upon the courts of the Union,<sup>2</sup> which depends solely upon the character of the parties, whatever may be the subject of controversy, and that which—as in admiralty, bankrupt and patent causes—relates to controversies of exclusively federal cognizance, there is no department of jurisprudence which the intellectual power, the learning, the dignity and the purity of Marshall and Story and their associates and successors have not enriched and adorned.

But while the judicial powers thus exercised were granted and are defined in the Constitution, the true power of the Court has resided and must ever dwell in the sincere respect and unbought confidence of the people of the United States.

<sup>1</sup> *Slaughter-house Cases*, 16 Wall, 82.

<sup>2</sup> *Cohens v. Virginia*, 6 Wheaton, 378.

"The people," said the great Chief Justice, in perhaps the greatest of his judgments.<sup>1</sup>—

"The people made the Constitution, and the people can unmake it. It is the creature of their will, and lives only by their will. But this supreme and irresistible power to make and to unmake resides only in the whole body of the people, not in any subdivision of them."

However exalted, therefore, the admiration justly due to the unique character and importance of its labors and to the extent and value of its contributions to jurisprudence, the highest eulogy of the Court is found in the respect and confidence with which its judgments have been received and obeyed. Not always unanimous, not in every case compelling immediate or universal assent to the reasons assigned for them, and on more than one important occasion reconsidered by the Court itself, its decisions have nevertheless been accepted as the final and authoritative exposition of the fundamental law, by a people conscious that with themselves still rest the form and destiny of their free institutions, and that upon their own reverence for the sanctions of law the safety and endurance of those institutions depend.

The century now ended had but half elapsed when De Tocqueville wrote:<sup>2</sup>

"A more imposing judicial power was never constituted by any people. The Supreme Court is placed at the head of all known tribunals, both by the nature of its rights, and the class of justiciable parties which it controls."

Reviewing, at the century's close, the exercise of those powers, with what patriotic pride, with what reverent thankfulness to the Supreme Ruler of nations, may we not justly regard, in

<sup>1</sup> *Cohens v. Virginia*, 6 Wheaton, 389.

<sup>2</sup> *Democracy in America* (Reeves' Trans., 1875), Vol. I, p. 148.

either view of its jurisdiction, this most august of human tribunals! In one aspect we contemplate the vast conflicting interests, of public and private concern, whose adjustment has been demanded by the unparalleled growth and development of a great people, and the still graver controversies among powerful States, such as elsewhere drain the life blood and make desolate the homes of nations; alike peacefully determined by those judgments, pronounced by illustrious men, the records of which are more glorious than the blazonry of battle flags, since upon them are inscribed the bloodless victories of peace, nobler than all the triumphs of war. In the other, the imagination pictures that impressive spectacle, the unbroken procession, through all these years, of the suitors who have come before its bar,—suitors, not suppliants, of every class and race and rank, the citizen, the friendless alien and the representative of the proudest State, for whose equal protection that sublime purpose, “to establish justice,” is declared.

Such are the judicial powers in whose pure and faithful exercise is reflected and fulfilled,—so far as mortal man may fulfil the perfect ordinances of Heaven,—that divine and eternal law “whose seat is the bosom of God, whose voice is the harmony of the world.”

Mr. Semmes, of Louisiana, was then introduced.

#### ADDRESS OF THOMAS J. SEMMES, ESQ.

“THE PERSONAL CHARACTERISTICS OF THE CHIEF JUSTICES.”

*Mr. President :*

During the century of its existence seven persons, exclusive of the present incumbent, filled the office of Chief Justice of the Supreme Court of the United States—Jay, Rutledge, Ellsworth, Marshall, Taney, Chase and Waite.

Most of these were appointed in the prime of life, Taney,



at 59, was the oldest; Jay resigned when he was but 50 years of age.

Marshall and Taney presided in the Court for sixty-three years—Marshall from 1801 to July, 1835, and Taney from 1836 to 1864. Marshall was appointed by John Adams about a month before the inauguration of President Jefferson; it was said that his appointment was due to his defense in Congress of the Administration in the case of Jonathan Robbins, who claimed to be an American citizen, and who had been delivered up, by order of the President, to the British Government as a deserter, and was hanged at the yard-arm of a British man-of-war.

Taney was appointed by Andrew Jackson shortly before the accession of Mr. Van Buren, and it is said he was appointed because of his aid to Gen. Jackson on the bank question, and especially as a reward for the act of removing the public deposits.

Marshall was a legacy left by the defeated Federalists to the victorious Republicans of that day; Taney, with the address that he had prepared for the President, was a legacy left by Gen. Jackson to the people of the United States.

Taney had been nominated by Gen. Jackson as an Associate Justice of the Supreme Court, while Marshall was Chief Justice; the Senate, under the domination of party spirit, indefinitely postponed the nomination, although we know from a letter addressed to Benjamin Watkins Leigh, then a Senator from Virginia, that Marshall desired the appointment of Taney to be confirmed.

These two men were born, Marshall on one side of the Potomac, in the year 1755, in Fauquier County, Va., and Taney on the other side of the Potomac, in the year 1777, in Calvert County, Md. Marshall was a member of the

Protestant Episcopal Church. Taney was a devout Roman Catholic.

Marshall was assailed by the Republicans of his day because of decisions in the case of *Marbury v. Madison* and on the trial of Aaron Burr. Taney met the same fate from the Republicans of his day, because of his decisions in the case of Dred Scott and in the Merryman *habeas corpus* case.

The criticism of Mr. Jefferson on the opinion of Marshall in the case of *Marbury v. Madison* is not altogether unfounded. The Chief Justice having reached the conclusion that the Supreme Court had no power to issue a writ of mandamus to the Secretary of State, it being an exercise of original jurisdiction not warranted by the Constitution, could have, and perhaps should have, abstained from entering upon the discussion of other questions not necessary to be decided; it is this discussion which Mr. Jefferson sarcastically called an obiter dissertation.

However that may be, Marshall vindicated the opinion entertained of him by the Federalists of that day, when he held that an act of Congress repugnant to the Constitution is not law, and that it is the province and duty of the Judicial Department to say what the law is, and that the Constitution is to be considered in courts as the paramount law, and that any other principle would subvert the foundation of all written constitutions, and would give to the legislature a practical and real omnipotence, while the Constitution professed to restrict their powers within narrow limits. Before this decision was made, there had been hesitancy and halting among judges as to the power of the Court to declare an act of Congress void, because of its repugnancy to the Constitution. This decision invested the Supreme Court with, or rather secured to it, a power which no court ever before pos-

sessed, and the possession of such power has elicited from a distinguished foreigner the remark, that the Court is not only a most interesting but a virtually unique creation of the founders of the Constitution. Ever since the decision rendered in the case of *Marbury v. Madison*, except during a paroxysm of passion, the eyes of the nation have been fixed on the Court as the guardian of the national Constitution and the harmonious regulator of interstate relations. The Romans regarded their Prætor "as the living voice of the civil law;" the Supreme Court is in fact the living voice of the Constitution; that is to say, it voices the will of the people as expressed in the Constitution.

The Court is the conscience of the people, who, to restrain themselves from hasty and unjust action, have placed their representatives under the restrictions of paramount law. It is the spirit and tone of the people in their best moments. It is the guarantee of the minority against the vehement impulses of the majority.

The Court also exercises a veto power on State action more potent than that proposed in the convention, although much less distasteful.

The veto power of the Supreme Court is constantly exerted, not, it is true, to annul State laws, but to declare in more euphemistic language that a State statute is no law, because it is repugnant to the Constitution.

Jefferson hated Marshall, who reciprocated his dislike.

During the trial of Burr, Marshall did not hesitate to issue a subpoena *duces tecum* to the President, requiring him to appear in court and produce a certain letter of General Wilkinson.

The determination of Marshall to decide Burr's case according to law, unawed by public clamor or by the denunci-

ations of those in power, is manifested in that part of his opinion where he says: "That this Court does not usurp power is most true. That this Court does not shirk from its duty is no less true. No man, might he let the bitter cup pass from him without reproach, would drain it to the bottom. But if he has no choice in the case, if there is no alternative presented to him but a dereliction of duty or the opprobrium of those who are denominated 'the world,' he merits the contempt as well as the indignation of his country who can hesitate which to embrace."

Marshall's sturdy conduct as a member of the commission to France in 1797 gave origin to the celebrated dinner toast, "Millions for defense, but not a cent for tribute."

Pickering, whose pen was usually dipped in gall, said: "Of the three envoys to France, the conduct of Marshall has been entirely satisfactory, and ought to be marked by the most decided approbation of the public."

And Patrick Henry, his political opponent, alluding to the bearing of Marshall, as one of the envoys to France, says: "His temper and disposition were always pleasant, his talents and integrity unquestioned. I love him because he felt and acted as a republican, as an American."

Chief Justice Marshall, when appointed, had reached the age of 45. William Wirt thus describes him:

The Chief Justice of the United States is in his person tall, meagre, emaciated; his muscles so relaxed as not only to disqualify him apparently for any vigorous exertion of body, but to destroy everything like harmony in his whole appearance and demeanor, dress, attitude, gesture; sitting, standing or walking he is as far removed from the idolized graces of Lord Chesterfield as any other gentleman on earth. His head and face are small in proportion to his height; his complexion swarthy; the muscles of his face being relaxed, make him appear to be fifty years

of age—nor can he be much younger. His countenance has a faithful expression of good humor and hilarity, while his black eyes, that unerring index, possess an irradiating spirit, which proclaims the imperial powers of the mind that sits enthroned within.

In this man what a legacy the dying Federalists bequeathed to the country! When Wolcott heard of the appointment, he said that, although Marshall was a man of virtue and distinguished talents, "he will think much of the State of Virginia, and is too much disposed to govern the world according to rules of logic; he will read and expound the Constitution as if it were a penal statute, and will sometimes be embarrassed with doubts of which his friends will not see the importance."

What has been the result? To use the language of Mr. Bryce: "It is hardly an exaggeration to say that the American Constitution as it now stands, with the mass of fringing decisions that explain it, is a far more complete and finished instrument than it was when it came fire new from the hands of the convention. It is not merely their work, but the work of the Judges, and, most of all, of one man—the great Chief Justice Marshall."

In 1775, when rumors were in circulation of the occurrences near Boston, Marshall, not then twenty years of age, marched to the muster field of the militia, twenty miles distant, wearing a plain blue hunting shirt and trousers of the same material, fringed with white, and a round black hat mounted with the buck's tail for a cockade. Elected a lieutenant, he, with his men, joined Patrick Henry in his march on Williamsburg.

With promoted rank, he was personally engaged in the battles of Iron Hill, Brandywine, Germantown, and Monmouth,

and with Washington's exhausted troops he went into winter quarters at Valley Forge, where, says Slaughter,

He was the best-tempered man I ever knew. During his sufferings, nothing discouraged, nothing disturbed him. If he had only bread to eat, it was just as well; if only meat, it made no difference. If any of the officers murmured at their deprivations, he would shame them by good-natured raillery, or encourage them by his own exuberance of spirits. He was an excellent companion, and idolized by the soldiers and his brother officers, whose gloomy hours were enlivened by his inexhaustible fund of anecdote.

He was with Wayne at the assault on Stony Point, and subsequently covered Major Lee's retreat after his surprise of the enemy at Powle's Hook, July 19, 1779. His military career terminated in 1781, having in the interval served under Baron Steuben, and aided in defeating Arnold's invasion of Virginia. In the year 1780, while waiting in Williamsburg for the organization of a new corps of troops, he studied law under Chancellor Wythe.

It was during the summer after the war that he walked to Philadelphia in order to be inoculated for the smallpox, and on his arrival he was refused admission to one of the hotels because of his shabby appearance, long beard, and worn-out garments. Some years afterward his rustic appearance lost him a fee. A gentleman who wished to retain a lawyer met Marshall one morning strolling through the streets of Richmond, attired in a plain linen roundabout and shorts, with hat under his arm, from which he was eating cherries, and although Marshall had been recommended to him, the careless, languid air of the young lawyer created such an unfavorable impression that the gentleman did not engage him. He was always easy, frank, friendly, and cordial in his manners and social in his habits. He was never very studious, and, although

temperate in his habits, was very fond of his bottle of Madeira at dinner. Without possessing beauty of style, melody of voice, grace of person, or charm of manner, he became a distinguished advocate and achieved rapid and extraordinary success at the bar.

Yet Mr. Wirt says: "This extraordinary man, without the aid of fancy, without the advantages of person, voice, attitude, gesture, or any of the ornaments of an orator, deserves to be considered as one of the most eloquent men in the world, if eloquence may be said to consist in the power of seizing the attention with irresistible force, and never permitting it to elude the grasp until the hearer has received the conviction which the speaker intends. His voice is dry and hard; his attitude, in his most effective orations, was often extremely awkward; while all his gestures proceeded from his right arm and consisted merely in a perpendicular swing of it, from about the elevation of his head to the bar, behind which he was accustomed to stand. As to fancy, if she holds a seat in his mind at all, his gigantic genius tramples with disdain on all her flower-decked plats and blooming parterres. How then, you will ask, how is it possible that such a man can hold the attention of an audience enchained through a speech of even ordinary length? I will tell you. He possesses one original and almost supernatural faculty: the faculty of developing a subject by a single glance of his mind, and detecting at once, the very point on which every controversy depends. No matter what the question, though ten times more knotty than 'the gnarled oak,' the lightning of heaven is not more rapid or more resistless than his astonishing penetration. Nor does the exercise of it seem to cost him an effort. On the contrary, it is as easy as vision. I am persuaded that his eyes do not fly over a landscape and take its

various objects with more promptitude and facility, than his mind embraces and analyzes the most complex subject."

Marshall married Miss Ambler, one of the colonial belles of Williamsburg, whom he courted while he was a young soldier. This union endured more than forty years. She died Dec. 25, 1831. The tender and assiduous attention he paid to her is one of the most interesting and striking features of his domestic life. Bishop Meade says: "She was nervous in the extreme. The least noise was sometimes agony to her whole frame, and his perpetual endeavor was to keep the house and yard and outhouses from slightest cause of distressing her, walking himself at times about the house and yard without shoes."

Judge Story said "She must have been a very extraordinary woman, and I think he is the most extraordinary man I ever saw for the depth and tenderness of his feelings."

I cannot forbear to quote in full a tribute to her memory, written by himself, Dec. 25, 1832, and found among his papers.

This day of joy and festivity to the whole Christian world is, to my sad heart, the anniversary of the keenest affliction which humanity can sustain. While all around is gladness, my mind dwells on the silent tomb and cherishes the remembrance of the beloved object which it contains.

On the 25th of December, 1831, it was the will of Heaven to take to itself the companion who has sweetened the choicest part of my life, has rendered toil a pleasure, has partaken of all my feelings, and was enthroned in the inmost recess of my heart. Never can I cease to feel the loss and to deplore it. Grief for her is too sacred ever to be profaned on this day, which shall be, during my existence, marked by a recollection of her virtues.

On the 3d of January, 1783, I was united by the holiest bonds to the woman I adored. From the moment of our union to that of our separation, I never ceased to thank Heaven for this, its best gift. Not a mo-



ment passed in which I did not consider her as a blessing from which the chief happiness of my life was derived. This never-dying sentiment, originating in love, was cherished by a long and close observation of as amiable and estimable qualities as ever adorned the female bosom. To a person which in youth was very attractive, to manners uncommonly pleasing, she added a fine understanding, and the sweetest temper which can accompany a just and modest sense of what was due to herself. She was educated with a profound reverence for religion, which she preserved to her last moments. This sentiment, among her earliest and deepest impressions, gave a coloring to her whole life. Hers was the religion taught by the Saviour of man. She was a firm believer in the faith inculcated by the church (Episcopal) in which she was bred.

I have lost her, and with her have lost the solace of my life. Yet she remains still the companion of my retired hours, still occupies my inmost bosom. When alone and unemployed, my mind still recurs to her. More than a thousand times since the 25th of December, 1831, have I repeated to myself the beautiful lines written by General Burgoyne, under a similar affliction, substituting "Mary" for "Anna:"

"Encompassed in an angel's frame  
An angel's virtues lay;  
Too soon did heaven assert its claim  
And take its own away.  
My Mary's worth, my Mary's charms,  
Can never more return.  
What now shall fill these widowed arms?  
Ah! me, my Mary's urn.  
Ah! me, ah! me, my Mary's urn."

One of his descendants, a great-grandchild, writes me that the family knew well she would learn from others her grandfather was a great man; "they told me he was only a good one. My father spent many Christmas holidays with his grandparents. His grandmother was an invalid, and intolerant of the slightest noise, but his grandfather was ever ready to be his playfellow and companion. Every morning and evening he would take him by the hand and bid him be very quiet;

then on tiptoe, with finger on his lips, he would take him to her room to say good morning and good night. He was a devoted lover every day of her life. He was an humble but devoted Christian. And he said he never failed to nightly say the little prayer, 'Now I lay me down to sleep,' which he learned at his mother's knee as soon as he could lisp."

With Marshall, the Chief Justices who had participated in the Revolution ended. Taney, though born during the Revolution, was twenty-two when Washington died. At fifty-nine he was Chief Justice; he died in the eighty-eighth year of his age, in Washington.

Taney was a man of iron will and undaunted courage, braved public opinion boldly when he thought it his duty, and, though naturally vehement and passionate, he used no harsh or vindictive language toward his traducers, and his temper was kept under perfect control.

Even when engaged in politics, the harshest expressions ever used by him were at a public meeting called by his political friends to greet him after his nomination as Secretary of the Treasury had been rejected by the Senate. It was the first time in the history of the government that the Senate had refused to confirm a Cabinet Minister nominated by the President.

Mr. Webster, in a speech at a public dinner, had alluded to Taney as "the pliant instrument of the President, ready to do his bidding;" for Taney, as Secretary of the Treasury, had ordered the removal of the public deposits from the United States Bank. At the meeting to which I refer Taney said: "Neither my principles nor my habits lead me to bandy words of reproach with Mr. Webster or any one else. But it is well known that he has found the bank a profitable client, and I submit to the public whether the facts I have stated

do not furnish ground for believing that he has become its 'pliant instrument,' and is prepared on all occasions to do its bidding whenever and wherever it may choose to require him. In the situation in which he has placed himself before the public, it would far better become him to vindicate himself from imputations to which he stands justly liable, than to assail others."

He had advised General Jackson in 1832 to veto the bill renewing the charter of the United States Bank, and he aided in preparing the veto message; in fact, he was the only member of the Cabinet who favored the veto.

The correspondence between General Jackson and Taney in August, 1833, has convinced every one that the removal of the public deposits from the United States Bank was not the act of the pliant instrument of the President, but of a Cabinet Minister in execution of a policy which he had urged upon the President.

The opinion in the Dred Scott Case elicited storms of disapprobation from heated partisans; the political leaders in paroxysms of rage traduced the Court and the Chief Justice, and for the first time in the history of the nation a political party, through its platform of principles and the President elected by them, inculcated the doctrine "that if the policy of the government upon vital questions affecting the whole people is to be irrevocably fixed by decisions of the Supreme Court, the instant they are made in ordinary litigation between parties in personal actions, the people will have ceased to be their own rulers, having to that extent practically resigned their government into the hands of that eminent tribunal."

The arbitrament of the Supreme Court being rejected, nothing was left but the sword. The judgment delivered in

the Dred Scott Case has been tried, as in the olden times, by an appeal to the wager of battle, and in that way it has been reversed.

When war came, Taney was not deterred by clamor, nor by flaming swords, nor by the insolence of power, nor by threats, from the performance of his official duty.

A distinguished gentleman of the Baltimore bar, who witnessed the trial of the Merryman *habeas corpus* case in Baltimore, thus described the scene to me:

I do not think that there ever was a more striking illustration of judicial dignity and self-restraint than what occurred at the hearing of the celebrated *habeas corpus* case of John Merryman, in 1861. It would not be easy to conceive a more remarkable manifestation of the control which one old and infirm man could exercise over a large and highly excited crowd by the mere force of his own personality and his hold on the public respect and affection. Long before the hour of the hearing the streets leading to the court-house were filled with a dense mass of people. It was not long after the 19th of April, 1861, and the popular mind had lost but little of the excitement of that occasion. The crowd, nevertheless, was comparatively quiet, but the suppression of feeling only added to its intensity. It would have needed but a word to start a popular movement, which would not have been checked, in any way, by the knowledge that a very considerable body of regular troops was at Fort McHenry. As the Chief Justice came down for the meeting of the Court he was leaning upon the arm of his young grandson. As he approached the crowd, half a square from the court room, every man lifted his hat, and a pathway was opened through the dense mass of people for him and his companion to pass. As the Chief Justice walked through, the whole crowd uncovered themselves, and they continued uncovered until he entered the court-house. The immediate approach to the entrance was so closely packed that the Chief Justice was compelled to pass down the side of the court-house to a private entrance, which gave him access to the bench from the rear of the building. The court room itself was so much crowded that I think it would have been difficult to pack a half dozen more men in it.

When the Chief Justice came in the most absolute silence prevailed. He asked the clerk, in his usual quiet and low tones, whether any return had been made to the writ. The officer whom General Cadwalader had made the bearer of his return proceeded to read it. His manner was not calculated to diminish the feeling of indignation and resentment, which was caused by the avowed determination of the General to disobey the mandate of the Court and disregard the rights of Mr. Merryman as a citizen. An intense but subdued excitement became visible throughout the court room, though the dead silence continued. The same excitement was soon communicated to the people outside. Nothing but the manner and bearing of the Chief Justice, and the veneration in which he was held, prevented an outbreak on the spot, of which General Cadwalader's messenger would probably have been the victim.

So great, however, was the silent influence of the Chief Justice, and the respect for his person and authority, that no demonstration of any kind was made, and the city was thus saved from a catastrophe which, in the then state of the public mind, could not have been otherwise than very disastrous, both in itself and its consequences. It was very difficult to conceive, without witnessing it, that, in a case involving the liberty of the citizen, and the legal and constitutional guarantees that secure it, any judicial officer, impressed with the responsibility of the occasion, and indignant, as he must have been, at the defiance of his mandate and the asserted supremacy of the Federal Executive over the Constitution and laws, could have so dealt with the matter, that the most careful observer could trace no departure, in the slightest degree, from the tranquil dignity which characterized the court in the daily exercise of its ordinary jurisdiction.

Taney was not ambitious of political office; political life did not suit his taste, because he was a thoroughly trained lawyer and devoted to his profession. He was a classical scholar, studied English with uncommon care; his style was simple and severe; in perspicuity and finish of language he was unsurpassed. He was a constant student; his studies embracing literature ancient and modern; his memory was surprising and his mind so logical, that its power of subtle

analysis, says Mr. Justice Curtis, exceeded that of any man he ever knew. He was a man of high breeding, and of extraordinary delicacy and courtesy; though vehement by nature, he was gentle in manners, generous to his opponents, and Mr. Justice Curtis says "as absolutely free from vanity or self-conceit as any man he ever knew."

The touch of romance in his nature was exhibited by his fondness for flowers, and his beautiful devotion to the memory of his mother, by whose side he wished to be buried. Though shy and reserved in his manners, he was most attractive at home, being to a large extent the companion of his daughters, for he had no sons. He married Miss Key, the sister of the author of the "Star Spangled Banner."

His love for her is portrayed in the following letter, dated January 7, 1852, at Washington:

I can not, my dearest wife, suffer the seventh of January to pass without renewing to you the pledges of love which I made to you on the seventh of January, forty-six years ago. And, although I am sensible that in that long period I have done many things which I ought not to have done, and have left undone many things that I ought to have done, yet in constant affection to you I have never wavered, never being insensible how much I owe to you, and now pledge to you again a love as true and sincere as that I offered on the seventh of January, 1806.

She died of yellow fever in 1855 at Old Point Comfort. Her death was a sore affliction to him; in a letter addressed to Mr. Justice Curtis, November 3, 1855, he says: "The chastisement with which it has pleased God to visit me has told sensibly on a body already worn by age as well as upon the mind; I shall meet you with a broken heart and with a broken spirit."

Religion was prominent in his life, he was a regular com-

municant in the Catholic Church; in a letter to his kinsman, he says: "Most thankful am I that the reading, reflection, studies, and experience of a long life have strengthened and confirmed my faith in the Catholic Church, which has never ceased to teach her children how they should live and how they should die."

He prized official integrity to a degree which is hardly appreciated by those not so delicate as he was; hence he refused, while Secretary of the Treasury, to accept a box of cigars as a present from the Collector of the Port of New York; he declined the dedication to him of Mr. Seward's speech on the French Spoliation Claims, lest its acceptance might be construed into interference in a measure pending before Congress. He never spoke ill of any man; he espoused the cause of the oppressed; and was charitable to the poor; he liberated the slaves that came to him as an inheritance, aided them in their employments, and took care of them when in want.

He was tall in stature, pale, thin, looked infirm and ready to drop into the grave. Near-sightedness gave him a sort of immobility of expression. He was affected with a morbid sensibility caused by delicate health from early youth; toward the end of his life he looked like a disembodied spirit, for his mind was not affected by his age or the infirmities of his body. He died October 12, 1864, in the eighty-eighth year of his age, and was buried by the side of his mother. He died in Washington, poor and neglected, his life went out like a candle expiring in its socket in a deserted chamber.

The lines of Horace, attached by him to his autograph sent on June 24, 1864, to Mrs. Alice Key Pendleton, are characteristic of the man:

Justum et tenacem propositi virum,  
Non civium ardor prava jubentium,

Non vultus instantis tyranni,  
Mente quatit solida.

The judicial life of Jay, Rutledge, and Ellsworth was so short that the interest attaching to them as Chief Justices, is diminished by the admiration they elicit as leaders of the revolution, and as statesmen.

All three were appointed by Washington. The judiciary bill was approved September 24, 1789. Jay was nominated and confirmed two days afterward. So great was the opinion entertained of his character and abilities that Washington gave him a choice of the offices under the Government. He preferred the office of Chief Justice as more in accord with his taste, his education and his habits. Before this he had been Minister to Spain, and President of Congress, and Secretary of State, and had negotiated the treaty of peace in 1782-83; he had also filled the office of Chief Justice of the State of New York; and, as a member of the New York Convention, had taken a leading part in framing the Constitution of that State in 1777.

It was he who prepared the address of the Continental Congress to the people of Great Britain, a vigorous, patriotic paper, which fixed the eyes of the people upon him.

His skill in negotiating the treaty of peace is universally recognized. He induced Franklin to concur with him and John Adams, in disregarding the instructions of Congress, to act in concert with our ally, the King of France, because he believed Vergennes, the French Minister, was playing a double part, injurious to the interests of the United States. At the time the propriety of his conduct was questioned, but subsequent disclosures of contemporary correspondence have vindicated his sagacity. While holding the office of Chief Justice he was appointed Minister to Great Britain, and negotiated



the celebrated treaty, which, though approved by Washington, was so much condemned by the public. On his return from England, having resigned the office of Chief Justice, he was elected Governor of New York, which office he filled for two terms. During his second term the political tide was turning against the Federalist party, to which he belonged.

The Republicans in the New York Legislature introduced a bill to divide the State into election districts, and provide for the choice of Presidential Electors by the people in the respective districts; this was defeated by the Federalist majority on Constitutional grounds. After the adjournment of the Legislature, it was thought that the district system would best promote the political interests of the Federal party.

Hamilton, in a letter dated May 7, 1800, proposed to Jay that he should reconvene the Legislature for the purpose of having passed the very bill which they had just defeated. Hamilton urged Jay not to be over-scrupulous, and that to the extraordinary nature of the crisis scruples of delicacy and propriety ought to give way. This letter was found among Jay's papers thus endorsed: "Proposing a measure for party purposes which I do not think it becomes me to adopt."

Washington placed the untried Constitution under the guardianship of a Chief Justice, who was not only a lawyer, but a statesman and a diplomatist, and especially a man familiar with the practical difficulties encountered in the administration of government during the revolution, and under the regime of the Confederation.

Although the decision rendered by Jay in *Chisholm v. Georgia* was reversed by the Constitutional amendment adopted in 1798, yet the tone of the decision, and the logical deduction from its principles, were significant of the change in the structure of the Government erected by the Constitution. The

country was startled by the claim that the people of the United States, as the sovereign people of a nation, had established a Constitution, by which it was their wish that the States should be bound, and to which the State Constitutions should be made to conform; that the sovereignty of the nation is in the people of the nation, and the residuary sovereignty of each State in the people of each State.

This was really the only important case decided by the Court while Jay was Chief Justice. He sat on the bench robed in the traditionary gown of the English judges, but he discarded the wig to wear the hair off the forehead, tied behind into a cue. He was a little less than six feet in height, well formed but thin, his complexion without color, his eyes blue and penetrating, his nose aquiline, and his chin pointed. His dress was black; his manner gentle and unassuming, but somewhat chilled by the dignity of the statesman. His style of speaking was quiet and limpid without gesture. He was philanthropic, and desired the extinction of slavery in accordance with a sentiment then prevalent even in the South, whose leading men at that time, especially those of Virginia, as Mr. Webster tells us, "felt and acknowledged that it was a moral and political evil; that it weakened the arm of the free man and kept back the progress and success of free labor."

Jay married in 1774 Miss Livingston, who, it is said, was very beautiful. She was the life of fashionable society in Philadelphia while he was secretary of foreign affairs under the Confederacy. Several children were the fruit of this marriage. His wife having suffered from delicate health for several years, died shortly after his retirement from public life.

Jay was by nature of a quick temper, but he kept it under control; he was straightforward and sincere; he had strong family and local attachments; he had an elevated sense

of justice; was tenacious in his friendships and in his enmities; his mind was vigorous, exact, and logical; penetration was its characteristic; but he was not a full or learned man, nor did imagination enlarge the compass of his thought or impart grace and flexibility to his mind. The Bible was his constant study, and his religion was a part of his being and displayed itself in the uniform tenor of his life. But the religion which descended to him from his ancestors came tinged with the spirit of intolerance, which Buckle tells us characterized the Huguenots wherever they had the power in France, the result, as he says, of that odium theologicum which is one of the characteristics of civil government when controlled by ecclesiastical influence. Mr. Jay proposed in the New York convention to exclude Roman Catholics from the privileges of citizenship, but fortunately the proposition was defeated by the spirit of the Revolution, which was stronger than the expiring fanaticism of the age.

When Jay resigned in 1795, Washington at once appointed John Rutledge, of South Carolina, to succeed him. He held the office but six months, having been rejected by the Senate on account of his violent opposition to Jay's treaty with Great Britain, and also, it is believed, on account of mental infirmity, caused by exposure in the swamps of South Carolina during the Revolutionary War.

He was a very interesting and remarkable man. His intellectual abilities were great, and his character earnest and resolute. His father was an Irish physician who settled in Charleston in 1734. He soon married a young lady of fortune, who was a mother at fifteen and a widow at twenty-six. John was born in 1739, and was the oldest of seven children. Having been fairly educated in the classics, he commenced the study of law at seventeen; after two years he went to

London and entered as a student in the Temple. Mansfield was presiding then in the King's Bench; Henley, afterward Lord Northington, was Lord keeper; Pratt, afterward Lord Chancellor and Earl of Camden, was Attorney-General, and Burke was just rising to fame, and Thurlow was just emerging from obscurity. He remained three years in the Temple, and, having been called to the bar, returned to Charleston in 1761. He commenced practice at the Charleston bar when he was twenty-two; his success was immediate. Instead of rising by degrees, he burst forth at once an able lawyer and an accomplished orator. His ideas were clear and strong; his utterance rapid, but distinct; his active and energetic manner of speaking forcibly impressed his sentiments on the mind and heart; he successfully used both argument and wit.

When the news of the passage of the stamp act reached Charleston he was chosen, by an assembly of the people, one of the delegates to the first Congress held in New York. Afterward, in 1774, he was sent with his brother, Edward Rutledge, to the Continental Congress. At the meeting to appoint delegates, question arose as to the power which should be conferred on them. Rutledge insisted that they should have plenary discretion, with power to pledge the people of South Carolina to abide by whatever the delegates would agree to; some one asked what must be done in case the delegates made a bad use of their power? His laconic answer was, "Hang them."

The Province of South Carolina on the 26th of March, 1776, adopted a State Constitution and established a State Government; Rutledge was chosen President, or Governor. When the British fleet of forty vessels approached Charleston, early in June, 1776, the decision and energy of the Governor caused the superiority of his genius to be acknowl-

edged by all. In the course of a few days five or six thousand men were assembled for the defense of Charleston. General Charles Lee, who had been appointed by Congress to take command in the Southern Department said that Fort Moultrie was a slaughter pen, and advised Governor Rutledge to order its abandonment. Rutledge declined to give the order, and wrote thus to Moultrie: "General Lee wishes you to evacuate the Fort, you will not do so without an order from me. I would sooner cut off my right hand than write one."

In 1780 Charleston fell, and no one could say when the Legislature might again be able to meet; that body, before its adjournment, clothed "the Governor and such of his council as he could conveniently consult with power to do everything necessary for the public good, except take away the life of a citizen without a legal trial." Hence he was called "Dictator John."

The British overran South Carolina, drove Rutledge from the State and defeated Gates. But Rutledge did not despair; he applied all his energies to the task of reorganizing the army; he commissioned Sumter as a Brigadier General, he conferred elevated rank on Pickens and Marion, procured from Congress a commission for Morgan, so that when Greene arrived he found Morgan at the head of his riflemen in Gates's army. Greene, in a letter written after the battle of Cowpens, describes the wretched condition of affairs, and then says: "We are obliged to subsist ourselves by our industry, aided by the influence of Governor Rutledge, who is one of the first characters I ever met."

In January, 1782, he called the Legislature together and surrendered his powers, because he thought them too great to be vested in any man in a free country, except to meet a

pressing emergency temporarily. No complaint was ever preferred against him for his administration while Dictator. He was an active and prominent member of the Convention which framed the Constitution of the United States; he overcame the opposition which the Constitution met with in South Carolina when it was submitted for ratification to the State Convention. He filled the office of Chancellor of the Equity Court of his State, and in 1791 was appointed Chief Justice of its law Court. He was appointed by Washington and confirmed by the Senate as an Associate Justice of the Supreme Court of the United States immediately on its organization in September, 1789, his commission being first in date. Having been appointed Chief Justice of South Carolina in February, 1791, he resigned the office of Associate Justice of the Supreme Court. In 1792 he lost his wife, an event that touched the deepest feelings of his heart, for he was both gentle and tender by nature.

He died 18th July, 1800, leaving eight children, six sons and two daughters. He was tall, well framed and robust; his forehead broad, his eyes dark and piercing; his mouth indicated firmness and decision; his hair, combed back according to the fashion of the day, was powdered and tied behind. His aspect was resolute, and wore an expression of thought and determination. His feelings were warm and ardent, and he had an impulsive energy, which, however, was controlled by a vigorous common sense. Earnestness was the secret of his power; the supreme element of his character was "Force."

Ellsworth was appointed March 4, 1796, and he too, like Jay, while holding the office of Chief Justice, was sent on a foreign mission. He was selected by President Adams as one of the envoys to France on Feb. 2, 1799, and left for Paris in the fall of that year.

He attained eminence at the bar very early in life, but he cuts no figure in the Revolution until he took his seat in Congress in the fall of 1778; from that period till 1782 he was an active member of the Committee of Appeals and aided Robert Morris in his financial schemes. After the Revolutionary war he was a conspicuous member of the Convention of 1787. He was jealous of the dominance of the larger States, and to his unyielding pertinacity the country is indebted for the final compromise of the Constitution, which gave to each State equality of representation in the Senate. He always urged the necessity of preserving the existence and agency of the State governments; the only chance, said he, of maintaining a general government lies in grafting it on those of the individual States.

To the sarcasm of Wilson, "that we are forming a government for men and not for imaginary beings called States," and to the invective of King against "the phantom of State Sovereignty," he replied "that his happiness depended on the existence of the States as much as a new-born infant on its mother for nourishment." In the Convention of his State called to ratify the Constitution he made an admirable speech, urging union as the only mode of saving Connecticut from the rapacity of New York on one side and of Massachusetts on the other. He said: "If we do not unite shall we not be like Issachar of old, a strong ass crouching down between two burdens?"

Elected to the Senate under the new Constitution, he framed the Judiciary Act of 1789, which alone is a monument to his skill and intellectual vigor. While he presided in the Court, but little business came before it, and no case of great importance was decided.

Ellsworth was tall, erect, with firm and penetrating blue

eyes, and of dignified demeanor. His manners were plain, simple and unaffected. Patient, attentive and laborious, he was endowed with great power of reflection, investigation and argument. President Adams speaks of him "as a great man of business." He himself said that he had no imagination, nor had he any fertility of mind or opulence of knowledge. It might be said of him what Hazlitt said of Pope: "He would be more delighted with a patent lamp than with the 'pale reflex of Cynthia's brow' that fills the sky with its soft silent lustre, that trembles through the cottage window, and cheers the watchful mariner on the lonely wave."

In Ellsworth's speeches there is no fancy, no grace, no splendor of diction, no genius; for genius is a mind in which imagination, intelligence and feeling exist in an elevated proportion and in exact equation. It has a penetrating view of ideas, and incarnates them powerfully in brass, in marble or in language. Ellsworth was a man who studied one subject at a time, and kept at it till he mastered it; he seldom worked with other men's tools; he had great penetration, remarkable power of analysis, and, like most men of intellect without much culture, he seized on the strong point, and left it for no other,—like Hercules with his club, armed with a single weapon, but that one powerful and massive.

He was earnest in tone, energetic in manner, lucid and simple in language, illustrating by a diagram, not a picture. In early life he was intended for the ministry, and studied theology a year after he graduated from Princeton College. He was called to the Bar in 1771, and married shortly afterward Miss Wolcott. Having nothing to live on, his father gave him a lease of a small, wild, uncultivated farm near Hartford. After three years' struggle with poverty, success at the bar was attained.



Although a grave and religious man of the New England type, he had conversational talents, and was agreeable in the social circle. He was a domestic man and especially fond of little children. Both of these traits are portrayed in the following letter written to his wife while he was Senator in the first Congress then sitting in New York:

The family in which I live have no white children. But I often amuse myself with a colored one about the size of our little daughter, who peeps into my door now and then, with a long story, which I cannot more than half understand. Our two sons I sometimes fancy that I pick out among the little boys playing at marbles in the street. Our eldest daughter is, I trust, alternately employed between her book and her wheel. You must teach her what is useful; the world will teach her enough of what is not. The nameless little one I am hardly enough acquainted with to have much idea of; yet I think she occupies a corner of my heart, especially when I consider her at your breast.

The story told of him by one of his biographers I can scarcely credit. After a protracted absence in Europe, he returned home. The whole family, who were expecting his arrival, descried him at a distance in his carriage, and hastened forth to welcome him. The biographer says he alighted from his carriage; but he spoke not to his wife, nor did he embrace his children. He glanced not even at his twin boys; but, leaning over the gate and covering his face, he silently breathed a prayer in gratitude to God.

The picture may be true; but it is not natural. Any man, except, perhaps, Simon Stylites, would have kissed his wife and children first.

Chase, when made Chief Justice in 1864, though younger than Taney and older than Marshall; in face, figure and majestic presence, was more distinguished than either.

He was less a lawyer than Taney, but he brought to the

bench a stock of learning equal to that which Marshall had begun with. His health failed in 1870; his eyes lost their lustre, and his face became wan and emaciated, so that in fact his judicial life practically terminated several years before his death in 1873.

When appointed he had been for many years engaged in political affairs, and it was difficult for him to throw off the hopes and aspirations and love of power which political life engenders. He was, in fact, an able politician, and felt that he could best serve his country as a statesman. He gives this estimate of himself in a letter to the Rev. Joshua Leavitt, dated October 7, 1863: "I really feel," he says, "as if with God's blessing I could administer the government of this country so as to secure and imperdibilize (there's a new word for you) our institutions, and create a party fundamentally and thoroughly democratic, which would guarantee a succession of successful administrations."

This aspiration was not entirely suppressed while he was robed in the ermine of justice.

Mr. Justice Clifford says:

Appointed, as it were, by common consent, he seated himself easily and naturally in the chair of justice, and gracefully answered every demand upon the station, whether it had respect to the dignity of the office or to elevation of the individual character of the incumbent, or to his firmness, purity or vigor of mind.

From the first moment he drew the judicial robes around him he viewed all questions submitted to him, as a judge, in the calm atmosphere of the bench, and with the deliberate consideration of one who feels that he is determining issues for the remote and unknown future of a great people.

Throughout his judicial career he always maintained that dignity of carriage and that calm, noble and unostentatious presence that uniformly characterized his manners and deportment; in the social circle and in his intercourse with his brethren, his suggestions were always couched in friendly terms, and were never marred by severity or harshness.

The faculty of reason was very broad and strong in him, yet without being vast or surprising; his education had all been of a kind to discipline and invigorate his natural powers; his oratory was vigorous, with those qualities of clearness, force, and earnestness which produce conviction.

His force of will was prodigious; his courage to brave and his fortitude to endure were absolute.

His adhesion to the Christian faith was constant and sincere, and he accepted it as the master and ruler of his life. He had a devout confidence in the moral government of the world by a personal God, as a present and real power controlling and directing all human affairs. He was all his life a great student of the Scriptures, and no modern speculations ever shook his belief.

Chief Justice Waite was a native of the State of Connecticut and a graduate of Yale College. His father held a high judicial position in Connecticut. Having studied law he emigrated to Ohio, prompted, no doubt, by the sturdy independence of his own nature. He achieved marked success in his profession, which caused him to be made one of the counsel of the United States in the matter of the Geneva arbitration. His argument in reply to that of Sir Roundell Palmer attracted some attention, but he was almost unknown to the profession and to the country when appointed Chief Justice by President Grant in January, 1874. He was not a great man, nor was he born to be the leader of men; nor had he any great ambition, nor any of that genius which in its struggle for supremacy seeks to surmount the world and say, like Lucifer, "place my throne by the throne of God." But to a certain extent his elevation re-enforced his character. There is no man called suddenly into public life who, in passing from his own house to preside in the capital of the nation over

the most dignified, if not the most powerful, tribunal on earth, has not been changed—transfigured. If he has not been it is evidence of such hopeless mediocrity that even the hand of God would hardly be able to produce anything from it.

Waite was trained in the ways of the law and of the courts; his opinions do not convey the impression of a commanding intellect, but they are clear, terse, vigorous and judicial.

He was absorbed in the obligations and responsibilities of his office, having no ambition beyond it. He was in manner plain, unattractive and unostentatious; his genial and social nature, combined with amiable courtesy, endeared him to the members of the bar. He was an upright and impartial judge, a good man and a pious Christian.

After an intermission of ten minutes, Mr. Phelps, of Vermont, was introduced.

ADDRESS BY HON. EDWARD J. PHELPS.

THE SUPREME COURT AND THE SOVEREIGNTY OF THE PEOPLE.

But few words remain to be added to those so well spoken by my distinguished brethren, in concluding, on the part of the Bar, the expression which this occasion calls for. We have thought it well to mark, in a manner thus significant and conspicuous, the centennial anniversary of our highest and greatest tribunal; to review, so far as the flying hour allows, its eventful and interesting history; to recall some of its memories, cherished and imperishable; and to consider, in the light of a century's experience, what has been and what is like to be hereafter, its place and its influence as an independent constitutional power in the Federal Government of this country.

We cannot forget that in its origin it was an experiment, untried and uncertain. Judicial history has not furnished another example of a court, created by an authority superior to legislation and beyond the reach of executive power, clothed with a jurisdiction above the law it was appointed to administer, and charged not merely with the general course of public justice, but with the limitation of the powers of political government, and the adjustment of the conflicting claims of sovereign States. The hundred years that now terminate have tested the value of all American institutions. Fortunate as they have been for the most part, it will yet be the judgment of dispassionate history, that no other has so completely justified the faith of its authors, or fulfilled with such signal success the purpose of its foundation.

What was that purpose? Not the limited original jurisdiction of the Court, dignified and important, but rarely invoked. Not chiefly even, its ordinary appellate jurisdiction, extensive and beneficent as it is, most desirable, yet perhaps not indispensable. Not for these objects, great though they are, was it placed or did it need to be placed on the singular eminence it occupies. Its principal and largest function was designed to be, as it has been, the defence and preservation of the Constitution that created it, as the permanent fundamental law on which our system of government depends.

Had that instrument been left only directory to the legislature, to be construed and given effect as the exigencies of party or the purposes of the hour might demand; had it been referred to the conflicting determination of various courts, with no supreme arbiter to correct their mistakes, or to harmonize their disagreements, so that its meaning might depend upon the State or the tribunal in which the question

happened to arise, it would speedily have become but the shadow of an authority that had no real existence, fruitful in a discord it was powerless to allay. American experience has made it an axiom in political science, that no written constitution of government can hope to stand, without a paramount and independent tribunal to determine its construction and to enforce its precepts, in the last resort. This is the great and foremost duty cast by the Constitution, for the sake of the Constitution, upon the Supreme Court of the United States.

The jurisdiction of the Court over questions of this sort, and the dual sovereignty so skillfully divided between the States and the Federation, as they are the most striking, are likewise the only entirely original features in the Constitution. All else found a precedent or at least a prototype in previous institutions. In its other branches it is mainly the combination and adaptation of machinery that was known before. It was to be expected, therefore, that the earliest and most critical exercise of the new power conferred upon the Court, would be displayed in dealing with the new form of sovereignty at the same time devised, and bringing into harmony those opposite forces that might so easily have resulted in conflict and disaster. The questions that have arisen in this field have been usually the most delicate, often the most difficult, always the most conspicuous of all that have engaged the attention of the Court. While it has been charged with the limitation of many other departments of governmental authority, here have been found hitherto its most prominent employment, and the most dangerous emergencies it has had to confront. Here have taken place its most celebrated judgments, the most signal triumphs of its wisdom, its foresight, as well as its moral courage—rarest of human virtues. It is to this sagacious judicial administration of the Constitution

that we are principally indebted for the harmonious operation that has attended the Federal system, each party to it made supreme in its own sphere, and at the same time strictly confined within it, neither transgressing nor transgressed. Looking back now upon this long series of determinations, it is easy to see how different American history might have been, had they proved less salutary, less wise, and less firm. The Court did not make the Constitution, but has saved it from destruction. Only in the one great conflict, generated by the single inherent weakness of the Constitution, and unhappily beyond judicial reach, has the Court failed to maintain inviolate all the borders and marches of contiguous jurisdiction, and to keep unbroken the peace of the Union.

But it still remains to be observed that the service of preserving, through the Constitution, the Union of the States, great and distinguished as it is, and vital as it is, has been wrought upon the machinery of government, not upon its essence. Beyond and above the question how a political system shall be maintained, lies the far larger question, Why should it be maintained at all? The forms of free government are valuable only as they effect its purpose. They may defend liberty, but they do not constitute it, nor necessarily produce it. Their ultimate permanence, therefore, among the men of our race, must depend, not on themselves, but on their results.

The true analysis of the function of the Supreme Court as the conservator of the Constitution, involves consequently the further inquiry, What is the value of the Constitution to those who dwell under the shadow of its protection?

It rests upon the foundation-stone of popular sovereignty. The true definition of that familiar and much-abused phrase is not always kept in view. The sovereignty of the people is

not the arbitrary power or blind caprice of the multitude, any more than of an aristocracy or a despot. It is not the right of any class, small or great, high or low, to wrong or oppress another. It is not a struggle between classes at all. It is simply the recognition of the natural and equal rights of man as the basis of a government formed for their protection by its people, and regulated by law. A system under which every citizen, in the peace of God and of the State, shall be assured by indefeasible right and not by favour or sufferance, in the enjoyment of his life, his liberty, his property in all its forms, his home, his family relations, his freedom of conscience and of speech. The powers of government, in all their extent and elaboration, come down at last to this ultimate purpose. For this they exist, and on this foundation is raised all that renders social life desirable. "In my mind," says Lord Brougham, "he was guilty of no error, he was chargeable with no exaggeration, he was betrayed by his fancy into no metaphor, who once said that all we see about us, King, Lords, and Commons, the whole machinery of the State, all the apparatus of the system and its varied workings, end in simply bringing twelve good men into a box."

The world has seen empires and dynasties without number, based upon arbitrary power. But for the most part it has seen them perish. They have illuminated the page of history, but with the light of the comet and the meteor, not of the stars. The civilization they have brought forth has been as transient as themselves. Neither government nor civilization contained any element of permanence, until they came to be founded upon the principles of civil and religious liberty. Magna Charta was therefore the starting-point, not merely of free institutions, but of the only civilization that ever did or ever could survive political systems, and pass on unimpaired



from the ruins of one to the construction of another. Its striking and memorable language no rhetoric has been able to improve, no casuistry to obscure. When it broke upon the world it proclaimed a new era, the dawning of a better day for humanity, in which the rights of man became superior to government, and their protection the condition of allegiance. The great thought matured with a slow but certain growth. Battles enough were fought for it, but never in vain. Until at last it came to be established forever upon English soil, and among the English race on every soil. And the highest eulogy upon the British Constitution was spoken when Chatham said: "The poorest man may in his cottage bid defiance to all the force of the crown; it may be frail, its roof may shake, the wind may blow through it; the storm may enter, the rain may enter, but the King of England cannot enter; all his forces dare not cross the threshold of the ruined tenement." But the great orator could go no further; he could not say that the British Parliament might not enter the home of the subject, for all the judges of England are powerless in the face of an Act of Parliament, whatever it may be. It was reserved for the American Constitution to extend the judicial protection of personal rights, not only against the rulers of the people, but against the representatives of the people.

The history of the Saxon race exhibits few changes more striking than the succession of power. First, in the king; then, when royal supremacy became intolerable, in the hands of the barons, who struck the earliest blow for freedom, and long stood between the throne and the people, the supporters of the one, the protectors of the other. When in the course of time that oligarchy had in its turn abused its authority, it passed to the Parliament chosen by the people. And when at last the founders of our Constitution, driven to revolution by

parliamentary oppression, had learned that even representative government cannot always be depended upon by those it represents, they placed the protection of personal rights beyond the reach of the popular will, and found in a constitutional judiciary the true and final custodian of the liberty of the subject.

The maintenance of these rights against all Federal interference was conferred upon the Court by amendment, almost immediately after the adoption of the Constitution, and as soon as it was perceived that the power ought to be expressed, because it might fail to be implied. The protection of them against State invasion in one important particular—the inviolability of contracts—was provided in the original Constitution. And when, twenty-two years ago, the interference of the States with the rights of life, liberty, and property was forbidden by the Fourteenth Amendment, the jurisdiction of the Court over this great subject became complete, and will, beyond doubt, always remain so. But one exception still exists, in the power of Congress, within the limited scope of its authority, to pass a law, though it may impair the obligation of a pre-existing contract.

Other topics of constitutional interpretation will always remain. The time will never come when questions of conflicting authority between the States and the Nation will cease to arise. But that field must gradually grow smaller, and its inquiries less critical. The main landmarks have now been planted, the boundary lines traced, the cardinal rules strongly and clearly established. Future labor in that direction, though constant, will be easier and plainer than in the century that has passed away.

But new attacks upon individual rights, in many forms and under many pretexts, are beginning to be heard of, and

are to be looked for in an increasing measure. The accursed warfare of classes is the danger that appears chiefly to threaten the future. It requires little prescience to perceive that the burden of constitutional administration by the Court is to shift hereafter in a considerable degree from the preservation of the machinery of government, to the enforcement of its ultimate object; from conflicts between the States and the Federation, to those between the State and the citizen, involving the protection of property, of contracts, of personal rights. But the best assurance that the Court will be found equal to the emergencies that are to come, whatever they may prove to be, is seen in the success with which it has encountered those of the past. And that success is most clearly shown by the public confidence it has inspired. The people of this country have learned to have faith in the Court, and pride in it. Elevated and in a measure isolated as it is, they still feel it to be their own. Many a plain man has never seen it, nor ever expects to see it. He cannot discriminate its jurisdiction, nor understand its procedure. The principles of its jurisprudence are not for his comprehension. But he reposes with a more confident security under the roof his industry has raised, and enjoys with a better assurance the liberty that has made him free, because he knows there is a limit which oppression cannot transgress; that he can never be disseized nor outlawed, nor otherwise destroyed; that no agency of power can go upon him or send upon him, but by the judgment of his peers and the law of the land; and he believes that if the worst should come to the worst, and wrong and outrage should be found intolerable and yet without other redress, there is still laid up for him a remedy under the Constitution of his country, to be compassed in some way or other, in the Supreme Court of the United States.

Long and late may it be, Sir, before that confidence is shaken. If it is sometimes childlike in its simplicity, it is always noble in its origin. Long and late may it be before even the suggestion shall penetrate the faith of common men, that the highest American justice is not for them. May no consideration of convenience, no pressure of business, ever seek its relief in any limitation, which shall carry the idea to the body of the people, that there is reserved in this country for the powerful corporation, the millionaire and the great financier, an ultimate justice that the humbler citizen cannot reach; that a ruinous cause may be decided against him without redress; and yet the same judgment in the case of another man, whose dealings are larger in amount though smaller in relative consequence, may be reversed and set aside as unlawful and unjust. Lawyers know that purely constitutional questions are not measured by figures. But that discrimination between the special and the general jurisdiction can neither be made nor understood by the mass of men. And such questions form, after all, but a small part of the administration of justice. Public confidence is a sensitive plant. No institution in a free government can afford to endanger it.

And thus, by the inexorable logic of sound constitutional principles, it has been brought to pass, that the rights of the people find their last and best security, not in the popular assembly, nor in any agency of its creation, but in that institution of government which is furthest of all beyond the popular reach, which is made, as far as any institution can be, independent of public feeling, and invulnerable to the attack of majorities. Having its origin in the sovereignty of the people, it is the bulwark of the people against their own unadvised action, their own uninstructed will. It saves them,

not merely from their enemies, it saves them from themselves. And so it perpetuates the sovereignty from which it sprang; and which has best provided for its own supremacy, by the surrender of a power it was dangerous to retain. For this purpose alone, aside from those necessary to its own maintenance, does the National Government cross the line of the States. All merely legal rights of the citizen, outside of Federal affairs, are left dependent upon the authority of the State in which he is found. Only the cardinal personal rights are taken in charge by the Nation, as between the Government and the individual, because only through that protection can be assured either the value or the permanence of a Constitution, which is itself the Government, and itself the Union.

The experience of American free government has shown that it is the tendency of its legislative branches to decrease, and of its judicial power to rise, in public estimation. It has added a fresh demonstration to the truth that is as old as the history of freedom, that it must find its safety where it found its origin, in the exertions of those to whom truth is better than popularity, and right superior to gain. And has proved again what has been proved so often, that the only liberty humanity can tolerate, is the liberty that is under the law.

To you, our especial and most honoured guests—Justices of the Court whose nativity we celebrate—more than *Patres Conscripti* in our Republic—the Bar of this country, in all its length and breadth, has to-day but one greeting to offer, one message to convey. It is the assurance of their supreme respect, their unfaltering confidence, their cordial attachment. The relations of the Court with the advocates who have from time to time gathered about it, have been always

among its happiest incidents. It has had the good fortune in an uncommon degree, to inspire them not merely with respect, but with a sincere personal affection. To this sentiment you have never been strangers, and you never will be. If the words of eulogy that have been so felicitously uttered by my brother have touched those who have gone before you rather than yourselves, it is because, and only because, they are with the dead and you are still among the living. Long may that restraint seal the lips of your eulogists.

Judges will be appointed and will pass away. One generation rapidly succeeds another. But whoever comes and whoever goes, the Court remains. The King may die, but still the king survives. Strong in its traditions, consecrated by its memories, fortified with the steadfast support of the profession that surrounds it, anchored in the abiding trust of its countrymen, the great Court will go on—and still go on. Keeping alive through many a century that we shall not see, the light that burns with a constant radiance upon the high altar of American constitutional justice.

The acknowledgments of the Court were made by Chief Justice Fuller, who, in presenting Mr. Justice Field, spoke as follows:

#### REMARKS OF CHIEF JUSTICE FULLER.

*Mr. Chairman:*

I rise to express to the New York State Bar Association and to those who have co-operated with it, on behalf of the Supreme Court of the United States, the appreciation of its members of the admirable manner in which the Centennial Anniversary of the Organization of the Judicial Department of

the General Government is being celebrated, and their sense of the cordial hospitality with which they have been welcomed to the metropolitan city, where the first session of the court was held. Their acknowledgments are due for the terms in which that welcome has been extended during these exercises, and for the discriminating and eloquent addresses in historical and biographical review of the court, and in exposition of its powers, the ends which it secures, and the vital functions which it exercises in the masterly constitutional scheme devised to perpetuate popular government—addresses worthy of the eminent men who have pronounced them, leaders of that great fraternity whence the membership of courts is derived, and upon whose assistance and support all courts rely.

But it is not for me, while tendering these acknowledgments, to enter upon those comprehensive reflections suggested by the occasion, and which should find expression on our part. That grateful duty appropriately devolves upon one of those veteran jurists, the fruitful labors of whose many years have imparted imperishable fame to the tribunal and themselves. Three of them, still shining in use, find work of noble note may yet be done in the cause to which their lives have been dedicated; while another, the recipient of the liveliest attachment on the part of his brethren and of the people he has served so well, maintains, in his well-earned retirement, a never-ceasing interest in the exalted administration of justice.

And I deem it a peculiar felicity that at a celebration conducted under the auspices of the Bar of the State of New York—that Bar which has given to the Supreme Bench a Jay, a Livingston, a Thompson, a Nelson and a Hunt, and whose Blatchford continues most worthily to adorn it—I am enabled to introduce, as a representative of the court, a member

of that same Bar who has reflected so much credit upon its training in more than thirty years of distinguished judicial service, Mr. Justice FIELD of California.

#### ADDRESS OF MR. JUSTICE FIELD.

"THE CENTENARY OF THE SUPREME COURT."

*Mr. President and Gentlemen:*

As the Chief Justice of the United States has been pleased to refer to my former connection with the Bar of this State and city, I beg to say that I still claim, with pride, membership there, and trust that the claim will be allowed. Although I remained in this city but a few years, swept away by the current which set, in 1849, for the Eldorado of the West, dreaming that I might perhaps in some way aid in laying the foundations of that great Commonwealth, which every one saw was to arise on the Pacific, I carried with me, and still retain, pleasant recollections of the learned Bar of that period, and of its great lawyers, to whom I looked up with admiration, George Wood, George Griffin, Daniel Lord, Francis B. Cutting, Benjamin F. Butler, John Duer, Charles O'Connor, James B. Gerard, James T. Brady and others—names never spoken of throughout our land without profound respect. In my subsequent life, in the varied experiences with which it has been marked, and with the extended acquaintance I have had with the legal profession, I have always regarded them as among the ablest and most learned of great advocates.

The Chief Justice in behalf of himself and his associates has expressed in fitting terms their high appreciation of the courtesy extended to them by the Bar Association of the State of New York, the remembrance of which they will carry through life. He has also expressed the pleasure which they



have felt, in common with all here present, in listening to the addresses made upon the organization of the Supreme Court, and its place in the constitutional system of the United States, and upon the lives and careers of the Justices who, by their expositions of the Constitution and their maintenance of its principles, have shed lustre upon that tribunal. But far beyond these eloquent discourses, and beyond the power of expression in words, is the eulogium presented by this vast assembly,—composed of great lawyers, eminent Judges, and men distinguished in different departments of life for their honorable public services,—gathered from all parts of our country, to celebrate the centennial anniversary of the court's organization, and to listen to the story of its labors during the hundred years of its existence,—an assembly presided over by one who has held the high office of President of the United States.

In every age and with every people there have been celebrations for triumphs in war—for battles won on land and on sea—and for triumphs of peace, such as the opening of new avenues of commerce, the discovery of new fields of industry and prosperity, the construction of stately temples and monuments, or grand edifices for the arts and sciences, and for the still nobler institutions of charity.

But never until now has there been in any country a celebration like this, to commemorate the establishment of a judicial tribunal as a co-ordinate and permanent branch of its government. The unobtrusive labors of such a department, the simplicity of its proceedings, unaccompanied by pomp or retinue, and the small number of persons composing it, have caused it to escape rather than to attract popular attention and applause.

This celebration had its inspiration in a profound rever-

ence for the Constitution of the United States as the sure and only means of preserving the Union, with its inestimable blessings, and the conviction that this tribunal has materially contributed to its just appreciation and to a ready obedience to its authority. For that Constitution the deepest reverence may well be entertained. Its adoption was essential to that dual government, by which alone free institutions can be maintained in a country so widely extended as ours, embracing every variety of climate, furnishing different products, supporting different industries, and having in different sections people of different habits and pursuits, and, in many cases, of different religious faiths.

Of this complex government—of its origin and operation—I may be pardoned if I say a few words, before speaking of its judicial department and of the peculiar functions which distinguish it from the judicial departments of all other countries, and before speaking of the necessity of legislation, that its tribunal of last resort may be as useful in the future as we believe it has been in the past.

Experience has shown that in a country of great territorial extent and varied interests, peace and lasting prosperity can exist with a civilized people only when local affairs are controlled by local authority, and at the same time there are lodged in the general government of the country such sovereign powers as will enable it to regulate the intercourse of its people with foreign nations and between the several communities, protect them in all their rights in such intercourse, defend the country against invasion and domestic violence, and maintain the supremacy of the laws throughout its whole domain. This principle the framers of the Constitution acted upon in establishing the government of the Union, by leaving unimpaired the power of the States to control all matters of

local interest, and creating a new government of sovereign powers for matters of general and national concern. They thus succeeded in reconciling local self-government—or home-rule as it is termed—with the exercise of national sovereignty for national purposes. Under this dual government each State may pursue the policy best suited to its people and resources, though unlike that of another State. And yet there can be no violent conflicts so long as the central government exercises its rightful power, and secures them against foreign invasion and internal violence, and extends to the citizens of each State protection in the others. The adaptation of this form of government for a far more extended territory than that existing at its adoption, has been demonstrated by the addition to the Union of new States with interests and resources in many respects essentially different from those of the original States, but which, from experience of its benefits and their instinctive yearning for nationality, have formed a like attachment to the Constitution.

The prosperity which has followed this distribution of governmental powers not only attests the wisdom of the framers of the Constitution, but transcends even their highest expectations. In the history of no people—ancient or modern—has anything been known at all comparable with the progress of the country since that time in the development of its resources, in the addition to its material wealth, in its application of science to works of public utility, in the increase of its population, and in the general contentment and happiness of its people. The predictions of the most enthusiastic as to its growth and prosperity never equaled the stupendous reality.

The Constitution of the United States, which, in ordaining this complex government, has been productive of such

vast results, was the outgrowth of institutions and doctrines inherited from our ancestors and applied under the new conditions of our country. A distinguished English statesman has designated it as the most wonderful product struck off at a given time by the brain and purpose of man; but this designation is only true as to the character of the instrument. Though it received definite form from the labors of the Convention of 1787, it was, in its division of governmental powers into three departments, and in its guaranties of private rights, the product of centuries of experience in the government of England. It had its roots deep in the past, as all enduring institutions have. The colonists brought with them the great principles of civil liberty, which had been established there after many a conflict with the Crown, and which were proclaimed in Magna Charta and in the Declaration of Rights. Our country was in this respect the heir of all the ages. Not a blow was struck for liberty in the Old World that did not wake an echo in the forests of the New. Every vantage ground gained there on its behalf was courageously and stubbornly held here. Thus liberty, with all its priceless blessings, passed from country to country, from hemisphere to hemisphere, and from generation to generation. Claiming this inheritance, the Continental Congress, assembled in 1774 to provide measures to resist the encroachments of the British Crown, declared that the inhabitants of the colonies were entitled, "by the immutable laws of nature, the principles of the English Constitution and their several charters, to all the rights, privileges and immunities of free and natural-born subjects within the realm of England." And when a subsequent Congress, in 1776, declared the independence of the colonies, it proclaimed that the rights of man to life, to liberty and to the pursuit of happiness—having then risen to a just appre-

ciation of their true source—were held by him, not as a boon from king or parliament, or as the grant of any charter, but as the endowment of his Creator, and declared also that to secure these rights—not to grant them—governments are instituted among men, deriving their just powers from the consent of the governed. The different communities, which, by the separation from the mother country, had ceased to be colonies and had become States, when framing new constitutions to conform to their new conditions, inserted guaranties for the protection of these rights, with other provisions required for the government of free commonwealths.

It was foreseen, however, by members of the Continental Congress, and by thoughtful patriots throughout the country, that when the independence of the colonies was recognized by the mother country, as sooner or later it must be, they would be at once surrounded by difficulties and dangers, threatening their peace and even their existence as independent communities. It was plain to them that, without some common protecting power, disputes from conflicting interests and rivalries, incident to all neighboring States, would arise between them, which would inevitably lead to armed conflicts and invite the interference of foreign powers, ending in their conquest and subjection; and that all that was gained by the experience of centuries and by the revolution on behalf of the rights of man and free government would be lost.

To provide against these apprehended dangers, a federation or league between the States was proposed as a measure of common defense and protection. Articles of Confederation were accordingly framed and submitted to the legislatures of the States, and finally adopted in 1781.

But, as we all know, these articles provided no mode of carrying into effect the measures of the Confederation, or

even the treaties made by it. They established no tribunal to construe its enactments and enforce their provisions. Its power was simply that of recommendation to the States, its framers appearing to have believed that the States had only to know what was necessary, in the judgment of Congress, for the general welfare, to provide adequate means for its accomplishment. A government which could only enforce its enactments upon the approval of thirteen distinct sovereignties necessarily contained within itself the seeds of its dissolution; it could not give the general protection needed. Having no power to exact obedience or to punish for disobedience to its advisory ordinances, its recommendations were disregarded not only by States but by individuals.

But though the government of the Confederation failed to accomplish the purpose of its creation, its experience was of inestimable value; it made clear to the whole country what was essential in a general government in order to give the needed security and protection, and thus prepared the way for the adoption of the Constitution of the United States. So out of the necessities of the times, to preserve whatever of freedom had been gained in the past,—gained after years of bitter experience, both in the mother country and in our own,—and to secure its full fruition in the future, that instrument was framed and adopted. By it the great defects of the Confederation were avoided, and a government created with ample powers to give to the States and to all their inhabitants the needed security—a government taking exclusive charge of our foreign relations, representing the people of all the States in that respect as one nation, with power to declare war, make peace, negotiate treaties and form alliances, and at the same time securing a republican government to each State and freedom of intercourse between the

States, equality of privileges and immunities to citizens of each State in the several States, uniformity of commercial regulations, a common currency, a standard of weights and measures, one postal system, and such other matters as concerned all the States and their people.

By the union of the States, which had its origin in the necessities of the war of the Revolution, which was declared in the Articles of Confederation to be perpetual, but which was rendered perfect only under the Constitution, the political body known as the United States was created and took its place in the family of nations. With that union the States became, in their relations to foreign countries and their citizens or subjects, one nation, and their people became one people, with a government designed to be perpetual. A dissolution of the Union would, indeed, remit the States to their original position of separate communities, and the United States ceasing to be a political body would pass from the family of nations. But such a possibility was never considered by the framers of the Constitution; no provisions are found within it contemplating such a result. As aptly stated by Chief Justice Chase, "the Constitution in all its provisions looks to an indestructible Union composed of indestructible States." Its government was clothed with the means to give effect to all its measures, which none have been able during the century of its existence successfully to resist. In the late civil war its strength was subjected to the severest test. But notwithstanding the immense forces wielded by the Confederate States, the extent of territory they controlled, and the vast numbers which recognized their authority, the government of the Union never for one hour renounced its claim to supreme authority over the whole country, and to the allegiance of every citizen thereof. And when the contest ended

—a contest which was the most tremendous and awful civil war known in history, though made resplendent with unprecedented acts of heroic courage on both sides—the armies of the Confederate States were scattered, and their whole government overthrown. Whilst the fiery courage and martial spirit of their people extorted our admiration,—we are all of the same warrior race,—their attempts to break the Union only disclosed the immovable solidity of its foundations and the massive strength of its superstructure. It was the dash of the tempestuous waves against the eternal rock. And, now, in all its wide domain, in respect to every right secured by the Constitution, no citizen of the Republic is beyond its power or so humble as to be beneath its protection. We can now confidently look forward to the time when the country will embrace hundreds of millions of people, and are justified in believing that the States will be united then, as now, by kindred sentiments, and common pride in the greatness and the glory of the country. We have an abiding faith that when we shall have surpassed—as we are destined to do—in the vastness of our empire, as in the civilization and wealth of our people, ancient Rome in her greatest days, we shall continue to be, for all national purposes, as now, one nation, one people, one power.

The crowning defect in the government under the Articles of Confederation was the absence of any judicial power; it had no tribunal to expound and enforce its laws.

In no one particular was the difference between that government and the one which superseded it more marked than in its Judicial Department. The Constitution declares not only in what courts the judicial power of the United States shall be vested, but to what subjects it shall extend. It is vested in one Supreme Court and in such inferior courts as



Congress may from time to time ordain and establish, and it extends not only to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States; and between a State, or the citizens thereof, and foreign States, citizens or subjects; but also to all cases in law and equity arising under the Constitution, the laws of the United States and treaties made under their authority. Cases are considered as arising under the Constitution, laws and treaties of the United States, whenever any question respecting that Constitution and those laws or treaties is presented in such form that the judicial power can act upon it—that is to say, when a right or claim is asserted for the maintenance of which a construction of that Constitution, or of a law or a treaty of the United States, is required.

No government is suited to a free people where a judicial department does not exist with power to decide all judicial questions arising upon its constitution and laws.

The Judicial Department established under the Constitution is thus co-extensive; it reaches to every judicial question which arises under the Constitution, treaties, and laws of the United States. It has devolved upon it, when such a question arises, beyond the ordinary functions of a judicial department under a single, as distinguished from a dual, government, the duty of determining whether the delegation of powers to Congress on the one hand, or the reservation of powers to the States on the other, is passed by either, and thus of preventing jarring conflicts. And in two particulars it is distin-

tinguished from the judicial department of any other country; one, in that it can summon before it the States of the Union, and adjust controversies between them, going even to the extent of determining disputes as to their boundaries, rights of soil and jurisdiction; the other, in that it can determine the validity or invalidity of an act of Congress or of the States, when the validity of either is assailed in litigation before it.

Controversies between different States of the world respecting their boundaries, rights of soil, and jurisdiction have been the fruitful source of irritation between their people, and not unfrequently of bloody conflicts. The history of many of the principalities of Germany in the fifteenth century is a history of desolating wars over disputed boundaries. The license, disorders and crimes usually attendant upon border warfare were the cause of widespread misery, until the establishment under Maximilian of an Imperial chamber for the settlement of such controversies, which brought out of chaos order and tranquillity in the German Empire.

Between the States in this country, under the Articles of Confederation, there were also numerous conflicts as to boundaries and consequent rights of soil and jurisdiction. They existed between Pennsylvania and Virginia; between Massachusetts and New Hampshire; and between Virginia and New Jersey. By the judicial article of the Constitution all such controversies are withdrawn from the arbitrament of war to the arbitrament of law. Thus, for the first time in the history of the world is the spectacle presented of a provision embodied in the fundamental law of a country, that controversies between States—still clothed, for purposes of internal government, with the powers of independent communities—shall be submitted to the peaceful and orderly modes of judicial procedure for settlement—controversies which Lord Chancellor Hardwicke, in

the case of *Penn v. Lord Baltimore*, said were worthy the judicature of a Roman senate rather than of a single judge.

The practical application of the power of the Supreme Court in this particular has been fruitful of happy results. In 1837, it settled a disputed boundary between Rhode Island and Massachusetts; in 1849, it brought to an adjustment the disputed line between Missouri and Iowa; and, in 1870, it settled the controversy between Virginia and West Virginia as to jurisdiction over two counties within the asserted boundaries of the latter. Certainly no provision of the Constitution can be mentioned, more honorable to the country or more expressive of its Christian civilization, than the one which provides that controversies of this character shall be thus peacefully settled. In determining them, the court is surrounded by no imperial guard; by no bands of janissaries; it has with it only the moral judgment and the invisible power of the people. Should the necessity arise, that invisible power would soon develop into a visible and irresistible force.

The power of the court to pass upon the conformity with the Constitution of an act of Congress, or of a State, and thus to declare its validity or invalidity, or limit its application, follows from the nature of the Constitution itself, as the supreme law of the land,—the separation of the three departments of government into legislative, executive and judicial—the order of the Constitution—each independent in its sphere, and the specific restraints upon the exercise of legislative powers contained in that instrument. In all other countries, except perhaps Canada under the government of the Dominion, the judgment of the legislature as to the compatibility of a law passed by it with the constitution of the country has been considered as superior to the judgment of the courts. But under the Constitution of the United States, the Supreme

Court is independent of other departments in all judicial matters, and the compatibility between the Constitution and a statute, whether of Congress or of a State, is a judicial and not a political question, and therefore is to be determined by the court whenever a litigant asserts a right or claim under the disputed act for judicial decision.

This power of that court is sometimes characterized by foreign writers and jurists as a unique provision of a disturbing and dangerous character, tending to defeat the popular will as expressed by the legislature. In thus characterizing it they look at the power as one that may be exercised by way of supervision over the general legislation of Congress, determining the validity of an enactment in advance of its being contested. But a declaration of the unconstitutionality of an act of Congress or of the States cannot be made in that way by the Judicial Department. The unconstitutionality of an act cannot be pronounced except as required for the determination of contested litigation. No such authority as supposed would be tolerated in this country. It would make the Supreme Court a third house of Congress, and its conclusions would be subject to all the infirmities of general legislation.

The limitations upon legislative power, arising from the nature of the Constitution and its specific restraints in favor of private rights, cannot be disregarded without conceding that the legislature can change at will the form of our government from one of limited to one of unlimited powers. Whenever, therefore, any court, called upon to construe an enactment of Congress or of a State, the validity of which is assailed, finds its provisions inconsistent with the Constitution, it must give effect to the latter, because it is the fundamental law of the whole people, and, as such, superior to any law of Congress or any law of a State. Otherwise the limitations

upon legislative power expressed in the Constitution or implied by it must be considered as vain attempts to control a power which is in its nature uncontrollable.

This unique power, as it is termed, is therefore not only not a disturbing or dangerous force, but is a necessary consequence of our form of government. Its exercise is necessary to keep the administration of the government, both of the United States and of the States, in all their branches, within the limits assigned to them by the Constitution of the United States, and thus secure justice to the people against the unrestrained legislative will of either—the reign of law against the sway of arbitrary power.

As to the decisions of the Supreme Court respecting the constitutionality of acts of Congress or of the States, they have, as a general rule, been recognized as furthering the great purposes of the Constitution;—as where, in *Gibbons v. Ogden*, the court declared the freedom of the navigable waters of New York to all vessels, against a claim of an exclusive right to navigate them by steam vessels under a grant of the State to particular individuals—or where, as in *Dartmouth College v. Woodward*, the court enforced the prohibition of the Constitution against the impairment by the legislation of a State of the obligation of a contract, declaring void an act of New Hampshire which altered the charter of the college in essential particulars, and holding that the charter granted to the trustees of the college was a contract within the meaning of the Constitution and protected by it; and that the college was a private charitable institution not under the control of the legislature;—or where, as in *Brown v. Maryland*, the court declared that commerce with foreign nations could not, under a law of the State, be burdened with a tax upon goods imported, before they were broken in bulk, though the tax was imposed in

the form of a license to sell;—or where, as in *Weston v. Charleston*, the court declared that the bonds and securities of the United States could not be subjected to taxation by the States, and thus the credit of the United States be impaired;—or where, as in *McCulloch v. Maryland* and *Osborn v. Bank of the United States*, the court denied the authority of the States, by taxation or otherwise, to impede, burden, or in any manner control the means or measures adopted by the government for the execution of its powers;—or where, as in *Hall v. De Cuir*; *The Wabash Railway Co. v. Illinois*; *The Philadelphia and Southern Steamship Co. v. Pennsylvania*, and other cases determined in the last quarter of a century, the court has removed barriers to interstate and foreign commerce interposed by State legislation.

And so in the great majority of cases in which the validity of an act of Congress or of a State has been called in question, its decisions have been in the same direction, to uphold and carry out the provisions of the Constitution. In some instances the court, in the exercise of its powers in this respect, may have made mistakes. The judges would be more than human if this were not so. They have never claimed infallibility; they have often differed among themselves. All they have ever asserted is, that they have striven to the utmost of their abilities to be right, and to perform the functions with which they are clothed, to the advancement of justice and the good of the country.

In respect to their liability to err in their conclusions this may be said—that in addition to the desire which must be ascribed to them to be just—the conditions under which they perform their duties, the publicity of their proceedings, the discussions before them, and the public attention which is drawn to all decisions of general interest, tend to prevent any

grave departure from the purposes of the Constitution. And, further, there is this corrective of error in every such departure; it will not fit harmoniously with other rulings; it will collide with them, and thus compel explanations and qualifications until the error is eliminated. Like all other error it is bound to die; truth alone is immortal, and in the end will assert its rightful supremacy.

And now, with its history in the century past, what is needed, that the Supreme Court of the United States should sustain its character and be as useful in the century to come? I answer, as a matter of the first consideration,—that it should not be overborne with work, and by that I mean it should have some relief from the immense burden now cast upon it. This can only be done by legislative action, and in determining what measures shall be adopted for that purpose Congress will undoubtedly receive with favor suggestions from the Bar Associations of the country. The Justices already do all in their power, for each one examines every case and passes his individual judgment upon it. No case in the Supreme Court is ever referred to any one Justice, or to several of the Justices, to decide and report to the others. Every suitor, however humble, is entitled to and receives the judgment of every Justice upon his case.

In considering this matter it must be borne in mind that, in addition to the great increase in the number of admiralty and maritime cases, from the enlarged commerce on the seas, and on the navigable waters of the United States, and in the number of patent cases from the multitude of inventions brought forth by the genius of our people, calling for judicial determination, even to the extent of occupying a large portion of the time of the court, many causes, which did not exist upon its organization or during the first quarter of the cen-

tury, have added enormously to its business. Thus by the new agencies of steam and electricity in the movement of machinery and transmission of intelligence, creating railways and steamboats, telegraphs and telephones, and adding almost without number to establishments for the manufacture of fabrics, transactions are carried on to an infinitely greater extent than before between different States, leading to innumerable controversies between their citizens, which have found their way to that tribunal for decision. More than one-half of the business before it for years has arisen from such controversies.

The facility with which corporations can now be formed has also increased its business far beyond what it was in the early part of the century. Nearly all enterprises requiring for their successful prosecution large investments of capital are conducted by corporations. They, in fact, embrace every branch of industry, and the wealth that they hold in the United States equals in value four-fifths of the entire property of the country. They carry on business with the citizens of every State as well as with foreign nations, and the litigation arising out of their transactions is enormous, giving rise to every possible question to which the jurisdiction of the Federal courts extends.

The numerous grants of the public domain, embracing hundreds of millions of acres, in aid of the construction of railways; also for common schools, for public buildings and institutions of learning; have produced a great variety of questions of much intricacy and difficulty. The discovery of mines of the precious metals, in our new possessions on the Pacific Coast, and the modes adopted for their development, have added many more. The legislation required by the exigencies of the civil war, and following it, and the constitutional amendments which were designed to give farther



security to personal rights, have brought before the court questions of the greatest interest and importance, calling for the most earnest and laborious consideration. Indeed, the cases which have come before this court, springing from causes which did not exist during the first quarter of the century, exceed, in the magnitude of the property interests involved, and in the importance of the public questions presented, all cases brought within the same period before any court of Christendom.

Whilst the constitutional amendments have not changed the structure of our dual form of government, but are additions to the previous amendments, and are to be considered in connection with them and the original Constitution as one instrument, they have removed from existence an institution which was felt by wise statesmen to be inconsistent with the great declarations of right upon which our government is founded; and they have vastly enlarged the subjects of Federal jurisdiction. The amendment declaring that neither slavery nor involuntary servitude, except as a punishment for crime, shall exist in the United States or any place subject to their jurisdiction, not only has done away with the slavery of the black man, as it then existed, but interdicts forever the slavery of any man, and not only slavery, but involuntary servitude—that is, serfage, vassalage, villeinage, peonage, and all other forms of compulsory service for the mere benefit or pleasure of others. As has often been said, it was intended to make every one born in this country a free man and to give him a right to pursue the ordinary vocations of life without other restraint than such as affects all others, and to enjoy equally with them the fruits of his labor. The right to labor as he may think proper without injury to others is an element of that freedom which is his birth-right.

The amendment, declaring that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, has proclaimed that equality before the law shall forever be the governing rule of all the States of the Union, which every person however humble may invoke for his protection. In enforcing these provisions, or considering the laws adopted for their enforcement, or laws which are supposed to be in conflict with them, difficult and far-reaching questions are presented at every term for decision.

Up to the middle of the present century the calendar of the Court did not average 140 cases a term, and never amounted at any one term to 300 cases; the calendar of the present term exceeds 1,500. In view of the condition of the Court—its crowded docket—the multitude of questions constantly brought before it of the greatest and most extended influence—surely it has a right to call upon the country to give it assistance and relief. Something must be done in that direction and should be done speedily to prevent the delays to suitors now existing. To delay justice is as pernicious as to deny it. One of the most precious articles of Magna Charta was that in which the King declared that he would not deny nor *delay* to any man justice or right. And assuredly what the barons of England wrung from their monarch, the people of the United States will not refuse to any suitor for justice in their tribunals.

Furthermore, I hardly need say, that, to retain the respect and confidence conceded in the past, the Court, whilst cautiously abstaining from assuming powers granted by the Constitution to other departments of the government, must un-

hesitatingly and to the best of its ability enforce, as heretofore, not only all the limitations of the Constitution upon the Federal and State governments, but also all the guarantees it contains of the private rights of the citizen, both of person and of property. As population and wealth increase—as the inequalities in the conditions of men become more and more marked and disturbing—as the enormous aggregation of wealth possessed by some corporations excites uneasiness lest their power should become dominating in the legislation of the country, and thus encroach upon the rights or crush out the business of individuals of small means—as population in some quarters presses upon the means of subsistence, and angry menaces against order find vent in loud denunciations—it becomes more and more the imperative duty of the Court to enforce with a firm hand every guarantee of the Constitution. Every decision weakening their restraining power is a blow to the peace of society and to its progress and improvement. It should never be forgotten that protection to property and to persons cannot be separated. Where property is insecure, the rights of persons are unsafe. Protection to the one goes with protection to the other; and there can be neither prosperity nor progress where either is uncertain.

That the Justices of the Supreme Court must possess the ability and learning required by the duties of their office, and a character for purity and integrity beyond reproach, need not be said. But it is not sufficient for the performance of his judicial duty that a judge should act honestly in all that he does. He must be ready to act in all cases presented for his judicial determination with absolute fearlessness. Timidity, hesitation and cowardice in any public officer excite and deserve only contempt, but infinitely more in a judge than in any other, because he is appointed to discharge a public trust

of the most sacred character. To decide against his conviction of the law or judgment as to the evidence, whether moved by prejudice or passion, or the clamor of the crowd, is to assent to a robbery as infamous in morals and as deserving of punishment as that of the highwayman or the burglar; and to hesitate or refuse to act when duty calls is hardly less the subject of just reproach. If he is influenced by apprehensions that his character will be attacked, or his motives impugned, or that his judgment will be attributed to the influence of particular classes, cliques or associations, rather than to his own convictions of the law, he will fail lamentably in his high office.

To the intelligent and learned Bar of the country the judges must look for their most effective and substantial support. Its members appreciate more than any other class the difficulties and labors and responsibilities of the judicial office; and whilst the most severe and unsparing of critics, they are in the end the most just in their judgments. If they entertain for the judges respect and confidence, if they accord to them learning, integrity and courage, the general public will not be slow in accepting their appreciation as the true estimate of the judges' character. Sustained by this professional and public confidence, the Supreme Court may hope to still further strengthen the hearts of all in love, admiration and reverence for the Constitution of the United States the noblest inheritance ever possessed by a free people.

At the conclusion of Mr. Justice Field's address the orchestra rendered Gillett's "Lion de Bal," which was to have been followed by an Address by the President of the United States, which was omitted owing to the detention of the President in Washington by the afflicting calamity which had be-

fallen the family of Mr. Tracy, the Secretary of the Navy. An "Ave Maria" was sung by the German Liederkrantz Society. The National Hymn "Our Country 'Tis of Thee" was then sung, the audience standing and joining. This was followed by the singing of the Doxology, after which the Benediction was pronounced by the Rev. Dr. Talbot W. Chambers of the Collegiate Reformed Dutch Church. The audience then dispersed, the orchestra playing Meyerbeer's "Fackeltanz in B minor."

In the evening, at the banquet at the Lenox Lyceum, Madison Avenue, in response to the toast "The Supreme Court of the United States," Mr. Justice Harlan spoke as follows:

## ADDRESS OF MR. JUSTICE HARLAN.

## "THE SUPREME COURT OF THE UNITED STATES."

*Mr. President:*

The toast you have read suggests many reflections of interest. But when an attempt is made to give shape to them, in my own mind, the fact confronts me that every line of thought most appropriate to this occasion has been covered by addresses delivered, in another place, by distinguished members of the bar, and by an eminent jurist responding on behalf of the Supreme Court of the United States. They have left nothing to be added respecting the organization, the history, the personnel, or the jurisdiction of that tribunal. It is well that those addresses are to be preserved in permanent form for the delight and instruction of all that are to come after us; especially those who, as judges and lawyers, will be connected with the administration of justice. I name the lawyers with the bench, because upon them, equally with the

judges, rests the responsibility for an intelligent determination of causes in the courts, whether relating to public or to private rights. As the bench is recruited from the bar, it must always be that as are the lawyers in any given period, so, in the main, are the courts before which they appear. Upon the integrity, learning and courage of the bar largely depends the welfare of the country of which they are citizens; for, of all members of society, the lawyers are best qualified by education and training to devise the methods necessary to protect the rights of the people against the aggressions of power. But they are, also, in the best sense, ministers of justice. It is not true, as a famous lawyer once said, that an advocate, in the discharge of his duty, must know only his client. He owes a duty to the court of which he is an officer, and to the community of which he is a member. Above all, he owes a duty to his own conscience. He misconceives his high calling if he fails to recognize the fact that fidelity to the court is not inconsistent with truth and honor, or with a fearless discharge of duty to his client. It need scarcely be said in this presence that the American Bar have met all the demands that the most scrupulous integrity has exacted from gentlemen in their position.

In the addresses to-day much was said of the Supreme Court of the United States that was gratifying as well to those now members of that tribunal as to all who take pride in its history. But, Mr. President, whatever of honor has come to that Court for the manner in which it has discharged the momentous trust committed to it by the Constitution must be shared by the bar of America. "Justice, sir," (I use the words of Daniel Webster,) "is the great interest of man on earth. It is the ligament which holds civilized beings and civilized nations together. Wherever her temple stands, and

so long as it is duly honored, there is a foundation for social security, general happiness, and the improvement and progress of our race. And whoever labors on this edifice with usefulness and distinction, whoever clears its foundations, strengthens its pillars, adorns its entablatures, or contributes to raise its august dome still higher in the skies, connects himself, in name and fame and character, with that which is and must be as durable as the frame of human society." The Temple of Justice which has been reared in this fair land is largely the work of our lawyers. If there be security for life, liberty and property, it is because the lawyers of America have not been unmindful of their obligations as ministers of justice. Search the history of every State in the Union, and it will be found that they have been foremost in all movements having for their object the maintenance of the law against violence and anarchy; the preservation of the just rights both of the government and of the people.

I read recently a brief speech by Mr. Gladstone, at a banquet given many years ago in honor of the great French advocate, Berryer. He had visited the south of Europe, and witnessed there much cruel oppression of the people. The executive power, he said, not only had broken the law, but had established in its place a system of arbitrary will. He found, to use his own words, that the audacity of tyranny, which had put down chambers and municipalities and extinguished the press, had not been able to do one thing—to silence the bar. He, himself, heard lawyers in courts of justice, undismayed by the presence of soldiers, and in defiance of despotic power, defend the cause of the accused with a fearlessness that could not have been surpassed. He was moved, on that occasion, to say of the English Bar, what may be truly said of the American Bar, that its members are in-

separable from our national life, from the security of our national institutions.

It has been said of some of the judgments of the Supreme Court of the United States that they are not excelled by any ever delivered in the judicial tribunals of any country. Candor, however, requires the concession that their preparation was preceded by arguments at its bar of which may be said, what Mr. Justice Buller observed of certain judgments of Lord Mansfield, that they were of such transcendent power that those who heard them were lost in admiration "at the strength and stretch of the human understanding."

Mr. President, I am unwilling to pass from this subject without saying what it is but just to say, that the bar of this imperial State has furnished its quota—aye more than its quota, to the army of great lawyers and advocates, who, by their learning, eloquence and labors, have aided the courts of the Union, as well as those of the States, in placing our constitutional system upon foundations which, it is hoped, are to endure for ages. Not to speak of the living, and not to name all the dead who have done honor to the legal profession in this State, I may mention Alexander Hamilton, "formed for all parts, in all alike he shined, variously great," William H. Seward, John C. Spencer, Thomas Addis Emmet, John Wells, George Wood, Joshua A. Spencer, Benjamin F. Butler, Daniel Lord, John Duer, James T. Brady, Ogden Hoffman, Charles O'Connor and Roscoe Conkling. Gentlemen of the bar of New York, you have in these and other great names upon the roll of lawyers and advocates given to the country by your State, an inheritance beyond all price.

But, Sir, while the Supreme Court of the United States is indebted to the bar of the country for its invaluable aid in the administration of justice, it is still more indebted to the



highest courts of the several States, and to the Circuit and District Courts of the Union. Many distinguished members of those courts—judges whose learning and integrity are everywhere recognized—have honored this occasion by their presence. But it is a most felicitous circumstance that we have with us the full bench of the New York Court of Appeals, of whose bar we are guests upon this occasion. Who can adequately estimate, who can overstate the influence for good upon American jurisprudence which has been exerted by the learned judgments delivered by those who have graced the bench of this proud State? Kent, Livingston, Thompson, Spencer, Jones, Nelson, Oakley, Savage, Walworth, Marcy, Bronson, Denio and Selden, not to mention others, will be remembered as long as the science of law has votaries. If what they wrote were obliterated altogether from our judicial history, a void would be left in American jurisprudence that could not be filled. Indeed, the history of American law could not well be written without referring to the judgments and writings of those eminent jurists.

And here it is appropriate to say that the duty of expounding the Constitution of the United States has not devolved alone upon the courts of the Union. From the organization of our government to the present time that duty has been shared by the courts of the States. Congress has taken care to provide that the original jurisdiction of the courts of the Union of suits at law and in equity arising under the Constitution and laws of the United States, or under treaties with foreign countries, shall be concurrent with that of the courts of the several States. This feature of our judicial system has had much to do with creating and perpetuating the feeling that the government of the United States is not a foreign government, but a government of the people of

all the States, ordained by them to accomplish objects pertaining to the whole country, which could not be efficiently achieved by any government except one deriving its authority from all the people.

As we stand to-night in this commercial metropolis, where the government created by the Constitution was organized, and where the supreme judicial tribunal of the Union held its first session, it is pleasant to remember that all along its pathway that court has had the cordial co-operation and support of the highest court of this, the most powerful of all the States. The Supreme Court of the United States, and the highest court of New York have not always reached the same conclusions upon questions of general law, nor have they always agreed as to the interpretation of the Constitution of the United States. But, despite these differences, expressed with due regard to the dignity and authority of each tribunal, they have stood together in maintaining these vital principles enunciated by the Supreme Court of the United States:

That while the preservation of the States, with authority to deal with matters not committed to national control, is fundamental in the American constitutional system, the Union cannot exist without a government for the whole;

That the Constitution of the United States was made for the whole people of the Union, and is equally binding upon all the courts and all the citizens;

That the general government, though limited as to its objects, is yet supreme with respect to those objects, is the government of all, its powers are delegated by all, it represents all, and acts for all;

That America has chosen to be, in many respects and to many purposes, a nation, and for all these purposes her government is complete, to all these objects it is competent.

Mr. President, a few words more. The members of the Supreme Court of the United States will return to their post of duty, with grateful thanks for the opportunity given them to participate in these Centennial exercises. It has been good for us to be here. You have given us, gentlemen, renewed reason to think that the Court of which we are members is regarded with affection and confidence by the bar of the country, and that as long as it shall be equal to the tremendous responsibilities imposed upon it, that affection and confidence will not be withdrawn.

We have met here to celebrate the organization of that Court, in this city, one hundred years ago—a tribunal fitly declared to be the living voice of the Constitution. Within that period the progress of the nation in all that involves the material prosperity and the moral elevation of the people, has exceeded the most sanguine expectations of those who laid the foundations of our government. But its progress in the knowledge of the principles upon which that government rests, and must continue to rest, if it is to accomplish the beneficent ends for which it was created, is not less marvelous. It was once thought by statesmen whose patriotism is not to be doubted, that the power committed to the Courts of the Union, especially to the Supreme Court of the United States, would ultimately destroy the independence, within their respective spheres, of the co-ordinate departments of the national government, and even endanger the existence and authority of the State governments. But the experience of a century, full of startling political and social changes, has shown not only that those apprehensions were groundless, but that the Father of our Country was right when he declared, in a letter to the first Chief Justice of the United States, that the judicial department was the keystone of our political fabric. Time has

grandly vindicated that declaration. All now admit that the fathers did not err when they made provision, in the fundamental law, for "one Supreme Court," with authority to determine, for the whole country, the true meaning and scope of that law. The American people, after the lapse of a century, have a firm conviction that the elimination of that court from our constitutional system would be the destruction of the government itself, upon which depends the success of the experiment of free institutions resting upon the consent of the governed. That those institutions, which have answered "the true ends of government beyond all precedent in human history," may be preserved in their integrity; that our country may, under all circumstances, be an object of supreme affection by those enjoying the blessings of our republican government; and that the Court whose organization you have assembled to commemorate may, in its membership as well as in its judgments, always meet the just expectations of the people, is the earnest wish of those to whom you have, on this occasion, done so much honor.

On the 19th of February, 1890, the General Committee met and resolved that a History of the Celebration be written and published, and duly appointed a Committee to prepare the same. It is in fulfilment of this duty that the foregoing sketch has been prepared and approved by the Committee thus appointed.

WILLIAM H. ARNOUX, *Chairman.*

GROVER CLEVELAND.

JULIEN T. DAVIES.

JOHN. F. DILLON.

WILLIAM ALLEN BUTLER.

# APPENDIX.

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The following is a list of the several committees appointed, and the members comprising the same :

## JUDICIARY CENTENNIAL COMMITTEE.

<i>Chairman</i> :	Wm. H. Arnoux . . . . .	New York.	
<i>Treasurer</i> :	Francis Lynde Stetson . . . . .	New York.	
<i>Secretary</i> :	Wm. B. Hornblower . . . . .	New York.	
Abbott, Austin . . . . .	New York.	Ellsworth, T. E. . . . .	Lockport.
Alexander, Robt. C. . . . .	New York.	Evarts, Wm. M. . . . .	New York.
Anderson, Henry H. . . . .	New York.	Ewing, Thos. . . . .	New York.
Andrews, Arthur L. . . . .	Albany.	Fairchild, Chas. S. . . . .	New York.
Astor, Wm. W. . . . .	New York.	Fancher, Enoch L. . . . .	New York.
Baker, Chas. S. . . . .	Rochester.	Fassett, J. Sloat . . . . .	Elmira.
Becker, Tracy C. . . . .	Buffalo.	Field, David Dudley . . .	New York.
Beckley, John N. . . . .	Rochester.	Fiero, J. Newton . . . . .	Kingston.
Benedict, Robert D. . . . .	Brooklyn.	Fowler, R. L. . . . .	New York.
Blatchford, Samuel A. . .	New York.	Gerry, Elbridge T. . . . .	New York.
Buchanan, Chas. J. . . . .	Albany.	Gilbert, Jasper W. . . . .	New York.
Burrill, John E. . . . .	New York.	Gillette, John . . . . .	Canandaigua.
Butler, William Allen . .	New York.	Gluck, Jas. F. . . . .	Buffalo.
Cardozo, Michael H. . . .	New York.	Green, Robert S. . . . .	New York.
Carter, James C. . . . .	New York.	Hale, Matthew . . . . .	Albany.
Chipp, Howard C., Jr. . . .	Kingston.	Hirschberg, M. H. . . . .	Newburgh.
Choate, Joseph H. . . . .	New York.	Hiscock, Frank . . . . .	Syracuse.
Clearwater, A. T. . . . .	Kingston.	Hoadly, George . . . . .	New York.
Cleveland, Grover . . . . .	New York.	Hornblower, Wm. B. . . .	New York.
Cockran, W. Bourke . . . .	New York.	Isaacs, Meyer S. . . . .	New York.
Comstock, Geo. F. . . . .	Syracuse.	Jay, John . . . . .	Katonah.
Cooke, Martin W. . . . .	Rochester.	Kernan, Francis . . . . .	Utica.
Coudert, Fredk. R. . . . .	New York.	Knevals, Sherman W. . . .	New York.
Cowen, Esek . . . . .	Albany.	L'Amoreaux, Jesse S. . . .	Ballston Spa.
Daly, Chas. P. . . . .	New York.	Larocque, Joseph . . . . .	New York.
Davies, Julien T. . . . .	New York.	Lockwood, Daniel . . . . .	Buffalo.
Davis, Noah . . . . .	New York.	Lowrey, Grosvenor P. . . .	New York.
Depew, Chauncey M. . . .	New York.	McCook, John J. . . . .	New York.
De Witt, Wm. C. . . . .	New York.	Martin, Isaac P. . . . .	New York.
Dillon, John F. . . . .	New York.	Milburn, John G. . . . .	Buffalo.
Diven, Geo. M. . . . .	Elmira.	Mitchell, Wm. . . . .	New York.

Morton, Levi P. . . . .	New York.	Rosendale, Simon W. . . . .	Albany.
Movius, E. H. . . . .	Buffalo.	Russell, Horace . . . . .	New York.
Nash, Stephen P. . . . .	New York.	Russell, Leslie W. . . . .	New York.
Nelson, Homer A. . . . .	Poughkeepsie.	Schoonmaker, Augustus . .	Kingston.
Olmstead, Dwight H. . . .	New York.	Sewell, Robert . . . . .	New York.
Opdyke, Wm. S. . . . .	New York.	Shepard, Elliott F. . . . .	New York.
Parmenter, R. A. . . . .	Troy.	Stetson, Francis L. . . . .	New York.
Parsons, John E. . . . .	New York.	Tabor, Chas. F. . . . .	Albany.
Patterson, Chas. E. . . . .	Troy.	Tracy, Benj'n F. . . . .	Brooklyn.
Peabody, Chas. A. . . . .	New York.	Turner, Robert T. . . . .	Elmira.
Peck, Fletcher C. . . . .	Nunda.	Van Vechten, A. V. W. . .	New York.
Pierrepont, Edwards . . . .	New York.	Van Voorhis, John . . . .	Rochester.
Proctor, L. B. . . . .	Albany.	Wendell, John D. . . . .	Fort Plain.
Potter, Orlando B. . . . .	New York.	Westbrook, Zerah S. . . .	Amsterdam.
Poucher, Wm. A. . . . .	Oswego.	Wheeler, Everett P. . . . .	New York.
Robertson, Wm. H. . . . .	Katonah.	Whitney, Wm. C. . . . .	New York.
Rogers, Sherman S. . . . .	Buffalo.	Winslow, John . . . . .	Brooklyn.
Rollins, Daniel G. . . . .	New York.	Woodford, Stewart L. . . .	Brooklyn.
Root, Elihu . . . . .	New York.		

## EXECUTIVE COMMITTEE.

Grover Cleveland, *Chairman.*

Chauncey M. Depew,	Wm. H. Arnoux,	} <i>Ex-officio.</i>
David Dudley Field,	Wm. B. Hornblower,	
John F. Dillon,	Orlando B. Potter,	
Francis Lynde Stetson,	Joseph Larocque,	
Robert Ludlow Fowler,	Robert Sewell,	
Charles P. Daly,	James C. Carter,	

## THE FINANCE COMMITTEE.

Orlando B. Potter, <i>Chairman.</i>	Robert D. Benedict,	} <i>Ex-officio.</i>
Elliott F. Shepard,	Horace Russell,	
Elbridge T. Gerry,	John G. Milburn,	
Julien T. Davies,	Wm. H. Arnoux,	
Noah Davis,	Wm. B. Hornblower,	
Edwards Pierrepont,	Francis Lynde Stetson,	

## COMMITTEE ON INVITATIONS.

Joseph Larocque, *Chairman.*

A. V. W. Van Vechten,	Elihu Root,	} <i>Ex-officio.</i>
A. T. Clearwater,	Wm. H. Arnoux,	
Daniel G. Rollins,	Wm. B. Hornblower,	

## COMMITTEE ON COMMEMORATIVE EXERCISES.

Robert Sewell, *Chairman.*

Thomas Ewing,	John Winslow,	} <i>Ex-officio.</i>
Frederick R. Coudert,	Wm. H. Arnoux,	
George Hoadly,	Wm. B. Hornblower,	

## COMMITTEE ON ENTERTAINMENTS AND RECEPTIONS.

James C. Carter, *Chairman*.

Joseph H. Choate,  
 Matthew Hale,  
 Martin W. Cooke,  
 John Van Voorhis,  
 William H. Robertson,  
 Wm. M. Evarts,  
 Frank Hiscock,  
 Stewart L. Woodford,

Everett P. Wheeler,  
 Wm. S. Opdyke,  
 J. Sloat Fassett,  
 M. H. Hirschberg,  
 George M. Diven,  
 E. L. Fancher,  
 Wm. H. Arnoux,  
 Wm. B. Hornblower, } *Ex-officio*.

## COMMITTEE ON TRANSPORTATION.

Robert Ludlow Fowler, *Chairman*.

Chauncey M. Depew.

## SPECIAL COMMITTEE ON ENTERTAINMENT OF INVITED GUESTS.

Julien T. Davies, *Chairman*.

William Mitchell,

Charles Henry Butler.

## REPRESENTATIVE COMMITTEE OF THE AMERICAN BAR ASSOCIATION.

David Dudley Field, *Chairman*, N. Y.  
 Lyman Trumbull . . . . . Illinois.  
 Henry Hitchcock . . . . . Missouri.  
 J. Randolph Tucker . . . . . Virginia.  
 Thomas J. Semmes . . . . . Louisiana.  
 William C. Endicott . Massachusetts.

Edward J. Phelps . . . . . Vermont.  
 Cortlandt Parker . . . . . New Jersey.  
 Henry Wise Garnett . Dist. of Col'ba.  
 Francis Rawle . . . . . Pennsylvania.  
 Charles Henry Butler, *Secretary*, N. Y.

## COMMITTEE ON PUBLICATION OF HISTORY OF CELEBRATION.

Wm. H. Arnoux.

Grover Cleveland.

Julien T. Davies.

John F. Dillon.

William Allen Butler.

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